

GEORGE H. HAYNES

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# THE SENATE OF THE UNITED STATES

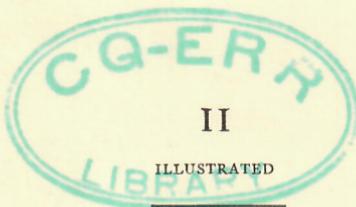
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*Its History and Practice*

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The Senate of the United States has been both extravagantly praised and unreasonably disparaged, according to the predisposition and temper of its various critics. . . . The truth is, the Senate is just what the mode of its election and the conditions of public life in this country make it.

WOODROW WILSON (1885)



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## XII

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THE SENATE'S PART IN TREATY-MAKING  
AND FOREIGN RELATIONS

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The individual Senators evidently consider the prerogative of the Senate as far more important than the welfare of the country.

THEODORE ROOSEVELT

A treaty entering the Senate is like a bull going into the arena; no man can say just how or when the final blow will fall, but one thing is certain — it will never leave the arena alive.

JOHN HAY

The treaty, in getting itself made by the sole act of the Executive without leave of the Senate, first had and obtained, committed the unpardonable sin. It must be either altogether defeated or so altered as to bear an unmistakable Senate stamp — and thus be the means of showing the world the greatness of the Senate.

RICHARD OLNEY (1897)

Treaties depend more completely than do domestic laws on the sanction and support of the popular will. Public opinion is not clear about arbitration today, and it is obvious that it was very little prepared in 1897.

HENRY JAMES (1923)

If the United States is to play the part in world affairs demanded by its interests and strength, a deadlock between the President and the Senate involving a really critical foreign problem may end in ruin.

W. STULL HOLT

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A single five-pointed star symbol centered below the fifth quote.

## XII

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### THE SENATE'S PART IN TREATY-MAKING AND FOREIGN RELATIONS

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BOTH at home and abroad events of recent years have made interest in the United States Senate center largely in its share in the treaty-making power.

In the Federal Convention's months of anxious debate the framers of the Constitution found that providing for the making of treaties was no separate and independent task, but that it was a part of the comprehensive problem of determining the structure of the new Federal Government and distributing the several powers which it must exercise. Similarly, when in the First Congress President Washington and the Senate, with no guiding precedents, began the work of translating the provisions of the Constitution into actual government, they found at once that treaty-making was closely bound up with the performance of other tasks devolved upon them, and with decisions in which the House of Representatives must have a share. In dealing with these two preliminary periods — of Constitution-making and of the first precedent-making — therefore, it has seemed essential to discuss the Senate's part in treaty-making in close association with its other powers. In so doing much ground which forms the logical approach to the present topic has already been traversed.<sup>1</sup> Only the briefest summary of these earlier developments is here needed.

<sup>1</sup> Pages 21-22; 31; 36.

## TREATY-MAKING BEFORE RATIFICATION OF THE CONSTITUTION

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As dependencies of Great Britain, the American colonies, of course, did not exercise the treaty-making power.<sup>1</sup> But the resolves adopted by the state conventions or assemblies in approving the Declaration of Independence make it plain that they considered the individual states as free and independent. 'To the Continental Congress, in which were assembled the representatives of the sovereign States, was yielded a temporary and indefinite authority for war purposes, but its permanent relation to the States was to be determined by future agreement.'<sup>2</sup> Meantime the new states were asserting and exercising powers of sovereignty. Thus, South Carolina specifically endowed its government with power to make war, conclude a peace and enter into treaties.<sup>3</sup>

Franklin, sent by Congress as American Minister to France, wrote that three several states were negotiating with France for loans and war and naval supplies, and that they seemed to think it his duty to support and enforce their particular demands.<sup>4</sup>

<sup>1</sup> In their relations with the British Government the individual colonies' interests were handled by colonial agents. In that capacity, for example, Benjamin Franklin successively served Pennsylvania (1765), Georgia (1768), New York (1768), and Massachusetts (1770).

<sup>2</sup> C. H. Van Tyne, 'Sovereignty in the American Revolution,' *American Historical Review*, XIII, 535. The Congress assumed the power to negotiate treaties as one required by the exigencies of the time. As authorized by the Continental Congress, the Committee of Correspondence sent Silas Deane to Europe as the agent of the Congress, to raise the question as to possible treaties with France, and the following year three commissioners appeared in Paris, announcing themselves as 'appointed and fully empowered by the Congress of the United States to propose and negotiate a treaty of amity and commerce between France and the said States.' Two treaties covering those relations were thus negotiated, and were promptly and unanimously ratified by Congress May 4, 1778, *Journal of Congress*, p. 257.

<sup>3</sup> B. P. Poore, *Constitutions*: S.C., II, 1625; Penn., II, 1545; N.C., II, 1412; Md., I, 825; Mass., I, 965 — all cited by Van Tyne. American diplomatic relations before 1789 are well handled by Gaillard Hunt in chapter I of *The Department of State in the United States*, and in brief summary by R. J. Dangerfield, *In Defense of the Senate*, 1-17.

<sup>4</sup> Van Tyne, *op. cit.*, 541.

Virginia ratified the treaty with France, and her diplomatic activity was so great that she established a clerk of foreign correspondence.... Not only were armies organized by States, but they were used for state ends, and Virginia in the case of the expedition of George Rogers Clark actually carried on war without the knowledge of Congress, at her own expense and for her own aggrandizement.<sup>1</sup>

While it is true that the Articles of Confederation asserted, 'The United States in Congress assembled shall have the sole and exclusive right and power . . . of sending and receiving ambassadors; entering upon treaties and alliances,' it is to be remembered that the Congress of the Confederation was merely a diplomatic assembly. 'They have therefore no will of their own, they are a mere diplomatic body and always obsequious to the views of the States.'<sup>2</sup> It was by this body, in which each state had one vote, that in the years from 1781 to 1789 nine treaties were made, the assent of nine states being necessary to ratification.<sup>3</sup> But though Congress, with slight limitations, had full power to make treaties, if any country had faith enough to join with us in negotiating them, there was a fatal lack of power to enforce their obligations upon American states or citizens. It remained for the Constitution to declare treaties to be a part of 'the supreme law of the land' and to create a federal judiciary by which those treaty obligations could be enforced.

#### THE TREATY-MAKING POWER IN THE FEDERAL CONVENTION

In the Convention it seems at first to have been taken for granted that, inasmuch as 'the national legislature ought to be empowered to enjoy the legislative rights vested in the Congress by the Confederation,' the making of treaties would be by Congress. No more definite allotment of the power is suggested in either the Virginia or the New Jersey Plan.<sup>4</sup>

Charles Pinckney asserted that 'for more than Four months & a half out of five the power of exclusively making treaties . . . was given

<sup>1</sup> Van Tyne, *op. cit.*, 541; Hening, *Statutes*, IX, 552.

<sup>2</sup> *Ibid.*, 542; Madison, *Writings*, III, 181, quoting Randolph.

<sup>3</sup> In the Federal Convention, June 8, 1787, C. Pinckney declared that 'foreign treaties had not escaped repeated violations' from state action. Madison, *Debates*, 75.

<sup>4</sup> During the months when the Federal Convention was in session, 'the country was in a great state of excitement over the proper enforcement of the provision of the Treaty of Paris regarding the collection of debts owing by Americans to citizens of Great Britain, and also in regard to the navigation of the Mississippi River.' Charles Henry Butler, in *The Treaty-Making Power of the United States*, I, 307. Chapters VI to IX present a valuable summary of the historical aspects of treaty-making in the United States.

to the Senate,'<sup>1</sup> in which, by the most strongly clinched provision of the entire Constitution, the states were presently assured of their 'equal suffrage.' The first suggestion of giving to the President a part in treaty-making seems to have come from Hamilton,<sup>2</sup> who proposed that the 'supreme Executive... have with the advice and approbation of the Senate the power of making all treaties.' At the time, this suggestion was not discussed. The Committee of Detail, August 6, still assigned this power to the Senate. Not until September 4, less than a fortnight before the end of the Convention, did Hamilton's suggestion get recognition in the Committee of Eleven's proposal, that 'the President by and with the advice and Consent of the Senate shall have power to make Treaties.' This called forth vigorous debate. But state jealousy could not overcome the logic of conferring upon the President, who must represent the country in all dealings with foreign nations, the lead in treaty-making.<sup>3</sup> To offset in some measure the concession which the states would thus make in giving the President 'an equal share in the sovereign power of making treaties which before the adoption of the Constitution was theirs without limitation or restriction,' the framers of the Constitution made 'the consent of the Senate by a two-thirds majority necessary to the ratification of any treaty projected or prepared by the President.'<sup>4</sup>

In the struggle to secure the ratification of the Constitution, the provisions as to treaties proved a major issue in Pennsylvania, South Carolina, and especially in Virginia, and led to the proposal of amendments, insisting upon ratification by a majority of all the members of the Senate, or by a three-fourths majority of the members of both Houses in case of treaties affecting 'the vital interests of territorial

<sup>1</sup> Letter to J. Q. Adams, Dec. 12, 1818; Madison, *Debates*, 599.

In Pinckney's Plan, as it was printed thirty years after the Convention, is found the provision: 'The Senate shall have the sole and exclusive power to declare war and to make treaties.' But it is by no means certain that that provision was a part of the original draft, submitted to the Convention May 29, 1787, for the accuracy of the 'copy' which the aged Pinckney supplied to be printed in the *Debates* has been thoroughly discredited. (*Ibid.*, Appendix IV, 596-97.) Certainly no motion had proposed, and no vote had 'given,' any such exclusive power to the Senate. In fact the only mention of the Senate in connection with treaty-making between May 29 and August 6 seems to have been Hamilton's proposal, here noted, and Wilson's casual remark, June 26, in debate on the Senators' term, that 'the Senate will probably be the depository' of the power 'to obtain treaties.'

<sup>2</sup> June 18. Elliot, *Debates*, V, 205.

<sup>3</sup> 'The theory of the Constitution undoubtedly is, that the President represents the people of the United States generally and the senators represent their respective States.' G. T. Curtis, *Constitutional History of the United States* (1889), I, 581.

<sup>4</sup> H. C. Lodge, *A Fighting Frigate*, 230. Note his partiality for the phrase, 'an equal share,' and also, his use of 'projected and prepared' instead of 'negotiated.'

rights, fisheries or navigation of American rivers.'<sup>1</sup> Among the most effective defenders of the Constitution's provisions as to treaty-making were Madison in Virginia, Iredell in North Carolina, and C. C. Pinckney in South Carolina, whose argument upon the particular point of the vesting of the treaty-making power was the most perspicacious presented in any of the ratifying conventions.<sup>2</sup>

In the press and in the pamphlet discussions of the pre-ratification period, the scope and the vesting of the treaty-making power received considerable attention. Most influential were the arguments in the *Federalist*, especially in Number 64, the work of John Jay, who, as a former representative of the United States abroad and at this very time Secretary of Foreign Relations under the Confederation, was without question better informed upon the subject than any other man in America; and in Number 65, a trenchant defense by Hamilton, who had been the first in the Federal Convention to propose that treaties be made by the President 'with the advice and approbation of the Senate.'<sup>3</sup>

<sup>1</sup> Elliot, *Debates*, III, 660; 246. In pre-Convention discussion, in the Convention and in the ratifying conventions the assuring of Americans' rights to navigate the Mississippi River and to fish in Newfoundland waters was a consideration of major importance in leading to the adoption of the 'two-thirds rule' in treaty-making. This point is well developed by R. Earl McClendon, in *American Historical Review* (July, 1931), 768-72.

<sup>2</sup> Elliot, *Debates*, IV, 277-78. 'Surely there is greater security in vesting this power as the present Constitution has vested it than in any other body. Would the gentleman vest it in the President alone?... Would he vest it in the House of Representatives? Can secrecy be expected in sixty-five members? The idea is absurd. Besides, their sessions will probably last only two or three months in the year; therefore, on that account, they would be a very unfit body for negotiation, whereas the Senate, from the smallness of its numbers, from the equality of power which each State has in it, from the length of time for which its members are elected, from the long sessions which they may have without any great inconvenience to themselves or constituents, joined with the President, who is the federal head of the United States, form together a body in whom can be best and most safely vested the diplomatic power of the Union.' (*Ibid.*, IV, 277-81.) Richard Henry Lee, 'The Federal Farmer,' and George Mason were among the bitterest critics, traversing familiar ground. (P. L. Ford, *Pamphlets*, 311; 327-31.) Judge Iredell ('Marcus') and David Ramsay ('Civis') made effective answer. (*Ibid.*, 333; 355.)

<sup>3</sup> 'In joining the Senate with the Executive in the negotiation and confirmation of treaties, they introduced a popular factor into the relations of the new nation with the powers of the world destined to work an important change in international affairs. And in requiring that all treaties should secure the vote of two-thirds of the Senate, the framers of the Constitution emphasized their conviction that the Executive should enter into no stipulations with a foreign power, which did not command the support of a large majority of the people of the United States.' J. W. Foster, *The Practice of Diplomacy*, 263.

## THE EXERCISE OF THE TREATY-MAKING POWER

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The President 'shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.' (Constitution, art. II, sec. 2, par. 2.)

In actual experience, what have been the results of this vesting of the treaty-making power jointly in the President and the Senate? In attempting to discuss this topic in the very restricted limits which can be accorded to it in a general study of the Senate's development and powers, it seems best at once to abandon a chronological treatment of the Senate's part in treaty-making, and instead to raise the question as to the stages in the process at which the Senate acts, as to the methods by which this power of the Senate is exercised, and as to the extent of power or influence in treaty-making which the Senate has claimed and been accorded.<sup>1</sup>

### THE INITIATION OF THE MOVEMENT FOR A TREATY

'There is no question that the Senate has a right so far to initiate a treaty as to propose one for the consideration of the President.'<sup>2</sup> For that matter, the House or any other body of citizens may submit their proposals to the President, but it is within his discretion to determine how much consideration they shall receive. On rare occasions the Senate has proffered its advice (1) that negotiations be entered upon, or (2) that they be not undertaken.<sup>3</sup>

<sup>1</sup> For this purpose the writer has made extensive use of the material brought together by the Legislative Reference Service of the Library of Congress. Especially serviceable have been the painstaking and very valuable *Memoranda* by Dr. C. C. Tansill, whose personal assistance upon many points is gratefully acknowledged.

<sup>2</sup> G. T. Curtis, *Constitutional History*, I, 579-81.

<sup>3</sup> The Senate, Feb. 14, 1806, by a vote of 23 to 7, adopted a resolution requesting the President to negotiate with Great Britain as to spoliations upon American commerce, the impressment of American seamen, and other differences. (*Annals of Congress*, XV, 90-111.) Plumer reports that Logan said: 'I have no confidence in the President.... he will not negotiate unless we resolve it is necessary.' Senator Smith said he 'had no doubt the President had the power to negotiate as fully without the resolution as with it,' but 'he was confident he [the President] would not treat with that nation unless the resolution passed.' Plumer opposed the resolution: 'It was usurping upon

Thus, March 3, 1835, by Senate resolution the President was respectfully requested to consider the expediency of opening negotiations 'with the governments of Central America for the purpose of securing protection by treaty stipulations for such individuals or companies as might undertake the construction of a canal across the Isthmus.' Nearly two years later, President Jackson sent a message to the Senate, announcing that immediately upon receipt of this resolution he had sent to the countries named an agent, whose recent report indicated that conditions were not such as to warrant opening a negotiation with any foreign government upon the subject.<sup>1</sup> March 3, 1888, the Senate passed a resolution that the President 'be requested to negotiate a treaty with the Emperor of China containing a provision that no Chinese laborer shall enter the United States.' This was a more urgent and specific request than the one which had been addressed to President Jackson. Five days later, President Cleveland replied that 'the importance of the subject referred to in this resolution by no means has been overlooked by the executive branch of the Government, charged under the Constitution with the formulation of treaties with foreign countries.' He added that 'negotiation with the Emperor of China for a treaty such as is mentioned in said resolution was commenced many months ago, and has been since continued.' He intimated that information as to the progress of such negotiations would have been available to any Senator who sought it, and expressed the hope that such a treaty would soon be concluded as would 'meet the wants of our people and the approbation of the body to which it will be submitted for confirmation.'<sup>2</sup> While neither Jackson nor Cleveland questioned that the Senate's action was within its rights,<sup>3</sup> the tone of the latter's message seems to indicate that he considered the Senate's resolution an impertinence. On the other hand, it was at President Lincoln's request that the Senate, February 25, 1862, passed a resolution that in its opinion the negotiation of a treaty with Mexico was then inadvisable.

On two occasions, more than a century ago, the expediency of the prerogatives of the President.... In no case, on the subject of treating with a civilized nation, have the Senate on their own motion ever undertaken to instruct or request the President to negotiate.... And if the Senate, as matter of right, have the authority to resolve when and with whom negotiation shall be made, they have an equal right to prescribe the principles and draw up the prime articles.... But what is worse, it is mischievous. It removes the just weight of responsibility from the President. It no longer leaves him answerable for his conduct... relating to the intercourse with other nations.' *Memorandum*, 429.

<sup>1</sup> *Messages*, 1491-92.

<sup>2</sup> *Ibid.*, 5194.

<sup>3</sup> H. C. Lodge, *A Fighting Frigate*, 250.

Senate's thrusting its unsought advice upon the President was the subject of spirited debate.<sup>1</sup> In February, 1806, when relations with Great Britain were becoming more strained, there was introduced and debated in the Senate a resolution 'That the President of the United States be requested to demand and insist upon the restoration of the property of their citizens....'<sup>2</sup> Although all agreed that it was within the Senate's right to give such advice, Worthington declared that it would doubtless 'embarrass the Executive in negotiating a treaty to settle our difficulties';<sup>3</sup> Adair believed that the Senate should be satisfied with expressing its 'opinion on the great principles of right, and leave it to our Chief Magistrate to enter into and point out details'.<sup>4</sup> On the other hand, Anderson insisted that the Constitution's treaty-making clause was phrased with the definite purpose to obtain the Senate's opinion prior to the making of a treaty,<sup>5</sup> and Mitchell declared that in urgent and arduous cases it was not only allowable for the Senate to exercise this right but it was its duty to do so.<sup>6</sup> February 14, 1806, this resolution was adopted by a vote of 23 to 7, many voting in its favor from the belief that it would help the President in the proposed negotiations.<sup>7</sup>

Ten years later this question was again thrust upon the Senate's attention by the action of Rufus King, who had himself been an influential member of the Federal Convention, and had later served in various diplomatic capacities. Dissatisfied with the treaty of commerce and navigation, to which the Senate had just given its consent, he introduced a resolution that the Senate 'recommend to and advise the President of the United States to pursue further and friendly negotiations with His Britannic Majesty' for six purposes which he enumerated.<sup>8</sup> This resolution was referred to the Committee on Foreign Relations, from which a significant report was made, February 15, 1816, by its chairman, Senator Bibb, to the effect that the proposed advice was uncalled for, since in the opinion of the committee the Executive had already made every effort to accomplish the objects mentioned in the resolution. It continued:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign

<sup>1</sup> See also the report of a committee, Dec. 6, 1791, recommending that it be 'Resolved by the Senate, in their capacity as Council of Advice,' that under certain conditions the Senate would consent to a treaty with Tunis. R. Hayden, *The Senate and Treaties* (1789-1917), 45-48; *Senate Executive Journal*, I, 91.

<sup>2</sup> *Annals of Congress*, 9th Cong., 1st sess., 92.      <sup>3</sup> *Ibid.*, 92.      <sup>4</sup> *Ibid.*, 105-07.

<sup>5</sup> *Ibid.*, 97.      <sup>6</sup> *Ibid.*, 100-01.      <sup>7</sup> *Ibid.*, 112.      <sup>8</sup> *Senate Executive Journal*, III, 7.

nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch. A division of opinion between the members of the Senate in debate on propositions to advise the Executive, or between the Senate and Executive, could not fail to give the nation with whom we might be disposed to treat the most decided advantages.... The committee are therefore of the opinion that the resolution ought not to be adopted.<sup>1</sup>

This report seems to have made a strong impression on the Senate. Action upon King's resolution was postponed once and again, and finally, on his own motion, was put over to a date sure to fall after Congress had adjourned.

Thirty years later, in 1846, when the Oregon controversy was at its height, President Polk headed off a project for the Senate's intervention. When Calhoun and another Senator laid before him a proposal to bring forward a resolution in executive session of the Senate, advising the President to reopen negotiations on the Oregon question and settle it by compromise, he told them that he thought it inadvisable. He asked them if they were sure such a resolution could command a two-thirds majority, and pointed out the fatal consequences if it should receive a smaller vote, since the result would be known in the streets and to the British Minister in twenty-four hours. He also warned them that some Senators might vote against the resolution on the ground that it was inexpedient, since the negotiation was in the hands of the Executive.<sup>2</sup>

Crandall cites a number of more recent instances of the Senate's volunteering its advice as to the starting of a negotiation.<sup>3</sup> Of course

<sup>1</sup> *Compilation of Reports of Senate Committee on Foreign Relations*, VIII, 22; J. W. Foster, *op. cit.*, 275; Hayden, *op. cit.*, 207.

<sup>2</sup> Polk, *Diary*, Feb. 25, 1846.

<sup>3</sup> S. B. Crandall, *Treaties, Their Making and Enforcement* (1916), 72-74, and n. 42. For earlier examples, see Ralston Hayden, *The Senate and Treaties*, 42-43 (resolution as to treaty with Emperor of Morocco, 1791), and 52-53.

For recent instance of embodying in an Act of Congress a request to the President to open negotiations for a treaty, see Act of June 29, 1906, 'for the control and regulation of the waters of the Niagara River.'

Senator Borah, December 14, 1920, introduced a joint resolution, authorizing the

the President cannot be compelled by resolution of the Senate or of both branches of Congress 'to exercise a power entrusted to him under the Constitution.'

#### THE SENATE'S PART IN PRELIMINARY NEGOTIATION

The President 'shall have Power, *by and with the Advice and Consent of the Senate*, to make Treaties provided two-thirds of the Senators present concur; and he shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint Ambassadors,' etc. How much discrimination and forethought were exercised in the placing of that repeated phrase?

Senator Lodge drew the conclusion that, whereas there is conferred upon the President the positive power to nominate officers, the Senate having only the power to consent or decline to consent to their appointments, on the other hand the requirement of the Senators' advice and consent is made precedent to the grant to the President of any power to 'make' treaties. He referred to the two-thirds majority necessary to the ratification 'of any treaty projected or prepared by the President.'<sup>1</sup> Here he carefully avoided the use of the word 'negotiated,' for it was his contention that 'the treaty, so called, is still inchoate, a mere project for a treaty, until the consent of the Senate has been given to it.'

It has recently been insisted in debate that the Senate's right to advise may be exercised at any stage in the process of treaty-making,

President to enter into negotiations with Great Britain and Japan in regard to the reduction of naval armaments. Debated and amended in both Houses, this resolution doubtless encouraged the calling of the Washington Conference of 1921, which made six treaties, and passed a number of resolutions chiefly for the benefit of China. (S. J. Res. 225; *Cong. Rec.*, 310. See comment by H. C. Lodge in *Foreign Affairs* (June 15, 1924), 527.)

Note also Borah's amendment to the House Cruisers Construction Bill, agreed to by the Senate (81 yeas; 1 nay), February 5, 1929. This bill, thus amended, was passed by the House, and became a law, containing these declarations:

*First.* That the Congress favors a treaty, or treaties, with all the principal maritime nations regulating the conduct of belligerents and neutrals in war at sea, including the inviolability of private property thereon.

*Second.* That such treaties be negotiated if practically possible prior to the meeting of the conference on the limitation of armaments in 1931.

Whenever the Senate's wish as to the opening of negotiations finds expression in joint or concurrent resolutions, as in the above instances, 'its initiation,' as Crandall observes, 'in such resolutions is not dependent upon its treaty-making authority.'

<sup>1</sup> *A Fighting Frigate*, 230. Upon this phrase, 'a mere project for a treaty,' Secretary Hay commented: 'That is to say that if France and the United States make a treaty, after careful study and negotiation, it is nothing more, when sent to the Senate, than a petition from the two nations to that body to make a real treaty for them. The attitude of the Senate toward public affairs makes all serious negotiation impossible.' (Letter to Henry White; Allan Nevins, *Henry White*, 154.)

and that the treaty is not 'fully made' or negotiated until consent has been given by the Senate as an equal partner in this business of treaty-making under the powers conferred by the Constitution.

In the words of Senator Bacon:

In the making of treaties it is proper for the Senate to advise at all stages.... We do not advise men after they have made up their minds and after they have acted; we advise men while they are considering, while they are deliberating, and before they have determined and before they have acted.<sup>1</sup>

On the other hand, Senator Spooner, using 'negotiation' in a narrower sense, declared:

From the foundation of government, it has been conceded in practice and in theory that the Constitution vests the power of negotiation... exclusively in the President.<sup>2</sup>

A report from the Senate Committee on Foreign Relations has been more positive and explicit:

The initiative lies with the President. He can negotiate such treaties as seem to him wise, and propose them to the Senate, which is as free and independent in its action upon the same as the President is in exercising his power of initiation and negotiation.... Whether he will negotiate a treaty, and when, and what its terms shall be, are matters committed by the Constitution to the discretion of the President.<sup>3</sup>

These two views are not so far apart as they seem in contrasted statement. They emphasize different stages of the process. 'Preliminary negotiations' extend 'from the initiation of the project up to the act of attaching their signatures by the representatives of the contracting parties.' The President is the sole agent of communication with foreign powers.

The time, the manner, the subject of the negotiation are all for him and him alone. He may begin at his pleasure and leave off at his will. He may conduct a negotiation through the usual diplomatic channels or by means of special agents of his own choosing.... He may bring

<sup>1</sup> *North American Review*, CLXXXII, 506.

<sup>2</sup> *Cong. Rec.*, XL, 1417-21; E. S. Corwin, *The President's Control of Foreign Relations*, 169-207.

<sup>3</sup> Dec. 15, 1902, 57th Cong., 2d sess., S. Doc. 47.

Senator Lodge later took a similar view: 'The action of the Senate becomes operative and actually effective only when a treaty is actually submitted to it. We have no possible right to break suddenly into the midst of a negotiation and demand from the President what instructions he has given to his representatives. That part of treaty-making is no concern of ours.... When the treaty made by those representatives comes before us, then is the time and not before, in which we can properly ask for information in regard to all which led up to it.' Jan. 24, 1906, *Cong. Rec.*, 1470.

forward any project which meets his approval, and he may decline to enter upon any topic which his judgment rejects. In the former event his work must ultimately be passed upon by the Senate, but in the latter the Senate is powerless to stir him to action.<sup>1</sup>

He may have been instigated to undertake the negotiation by more or less formal urging from the Senate. And while the *pourparlers* are in progress, the Senate may manifest its interest and its attitude by adopting resolutions calling upon the Executive for information. These requests, in some such phrase as 'if not incompatible with the public interest,' usually give frank recognition to the importance of that 'secrecy and dispatch' which led the framers of the Constitution to assign to the President the leading rôle in treaty-making. But no President, or Secretary of State, will ignore such a request, or treat it as a mere impertinence, for the absolute necessity of securing the Senate's consent to the ultimate project makes conciliation prudent in this earlier stage.

'Supplementary negotiations' extend from the time the signed treaty is submitted to the Senate till that body has given its advice and consent to ratification. During this period the Senate works its will upon the project, while the President and Secretary of State hope for the best while often expecting the worst<sup>2</sup> for the fruit of their labors. Yet the amendments or reservations which the Senate may see fit to submit for the consideration of the foreign government are as much a stage of negotiations as the preceding action of the Secretary of State.<sup>3</sup>

#### HOW MAY THE PRESIDENT OBTAIN THE SENATE'S ADVICE BEFORE THE SIGNING OF A TREATY?

*By Direct Personal Consultation with the Senate as a Council*

There can be no doubt that the framers of the Constitution expected that the President would meet with the Senate as an executive council, and that together they would work out the details of a treaty project. Pierce Butler, a member of the Federal Convention, expressed his understanding of the normal procedure thus:

Treaties to be gone over, clause by clause, by the President and Senate together, and modelled.... No council ever committed anything. Com-

<sup>1</sup> John W. Davis, *The Treaty-Making Power in the United States* — an address at Oxford, Eng., Feb. 20, 1920.

<sup>2</sup> J. M. Mathews, *The Conduct of American Foreign Relations*, 36-38.

<sup>3</sup> J. W. Foster, *op. cit.*, 277.

mittees were an improper mode of doing business; it threw business out of the hands of the many into the hands of the few.<sup>1</sup>

President Washington was even more explicit as to how treaties should be 'made.' Fully appreciating the importance of the precedents that were being established in the first contacts between the Executive and the Senate, he made no objection to meeting the committee of three Senators appointed August 6, 1789, to wait upon the President and confer with him on the mode of communication proper to be pursued between him and the Senate 'in the formation of treaties and making appointments to office.' The President's memorandum shows that the first 'sentiment' which he thought essential to put before them was that 'in all matters respecting treaties, oral communications seem indispensably necessary.'<sup>2</sup>

This procedure was soon put to trial. August 21, 1789, the President sent the Senate a curt notice that he would meet with them on the morrow, and the next day he appeared with General Knox. President and Senate met under some tension, for he had just been affronted by the Senate's first petty rejection of a nomination and had thereupon sent to the Senate a suggestion that it would be well if the Senate should consider fitness rather than favoritism in passing upon appointments to public offices. In this interview embarrassment increased and soon developed into friction. The President was obviously annoyed when 'the business labored with the Senate'; and, when the Senate started to debate the motion that the papers communicated by the President be referred to a committee, he 'started up in a violent fret,' exclaiming, 'This defeats every purpose of my coming here!'<sup>3</sup> Nevertheless the papers were thus committed. During the long pause which followed his consenting to a postponement, he withdrew, as it seemed to Maclay, 'with sullen dignity.' The following Monday the business went forward smoothly, and advice was given by vote on each of the points which the President raised. 'Yet a shamefacedness, or I know not what, flowing from the presence of the President, kept everybody silent.'<sup>4</sup>

<sup>1</sup> John Adams, *Writings* (ed. C. F. Adams, 1851), III, 409.

<sup>2</sup> Pages 62-68; Washington, *Writings* (ed. Sparks), X, 25; 484-86.

<sup>3</sup> Maclay, *Journal*, 128-33.

<sup>4</sup> Although this was the first, and last, instance of the Senate's participating 'as a council' in the making of a treaty which had been negotiated under the Constitution, it is to be remembered that treaties (e.g., the Consular Convention with France, 1788) were thus made in and by the Congress of the Confederation, and that, aside from two Indian treaties, the first treaty referred to the Senate by President Washington was one the negotiation of which had been authorized by the old Congress. When considering

Tradition says that the chilling reception which he had met in the Senate Chamber led Washington to swear that he would never go there again.<sup>1</sup> From that day down to the present (1938) the Senate rules have continued to make provision for the procedure to be observed 'when the President of the United States shall meet the Senate in the Senate Chamber for the consideration of Executive business.'<sup>2</sup> But no later President appeared in person before the Senate until January 22, 1917, when President Wilson came 'to disclose his thought and purpose' as to a League for Peace.<sup>3</sup> July 10, 1919, he again came to the Senate Chamber to lay before that body the Treaty of Versailles, not as a project on which he asked advice, but as a completed instrument to which he urged their unqualified consent.<sup>4</sup>

*By Request in Special Message to the Senate*

Washington's disillusionment as to the advisability of treaty-making in direct personal conference with the Senate did not lessen his belief that the Senate was entitled to participate in preliminary negotiation.<sup>5</sup> By special message in four early instances he raised the question as to the advisability of carrying forward treaty negotiations with several Indian tribes, and in each case the Senate advised that treaties be concluded on the suggested terms.<sup>6</sup> Senate records indicate that these treaties were subjected to critical scrutiny. Its committee in one instance reported that they found that the treaty conformed strictly to the entire instructions given by the President, and that 'these instructions were founded on the advice and consent of the Senate of the 11th of August, 1790.'<sup>7</sup>

this treaty the Senate called Secretary Jay into personal conference. (J. W. Foster, *op. cit.*, 267.) In this instance, despite the fact that it was believed the United States would be the loser if the treaty were ratified, the Senate advised ratification when Secretary Jay declared that in his opinion the faith of the nation was pledged to ratification. (Hayden, *op. cit.*, 4-7.)

<sup>1</sup> Page 66.

<sup>2</sup> Senator Lodge, in a speech in the Senate, Jan. 24, 1906, said: 'Yet I think we should be disposed to resent it, if a request of that sort was to be made to us by the President.' *Cong. Rec.*, 59th Cong., 1st sess., 1469.

<sup>3</sup> *Ibid.*, LIV, 1741-43.

<sup>4</sup> *Ibid.*, LVIII, 2336-38.

<sup>5</sup> As an earlier illustration of his unwillingness to overstep the proprieties or to encroach upon the Senate's rights, in certain negotiations with the Spanish Minister, President Washington wrote to Jay: 'Will it be expedient and proper at this moment, for the President to encourage such an idea; at any rate without previously advising with the Senate?' July 14, 1789. (Washington, *Writings*, X, 14.)

<sup>6</sup> Messages of March 7 and 23, and May 8, 1792. In compliance with the unanimous advice of his Cabinet (Feb. 25, 1793) he discontinued consulting the Senate prior to opening negotiations with Indian tribes. Crandall, *op. cit.*, 68, n.

<sup>7</sup> Hayden, *op. cit.*, 33; Senate *Executive Journal*, I, 85.

The Secretary of State formally advised the President that, since the ultimate fate of a treaty depended upon the Senate's consent, it was advisable when possible to secure its advice before the opening of negotiations.<sup>1</sup> The form taken by the request for advice differed according to the circumstances. Thus, February 9, 1790, in submitting to the Senate papers relating to the controversy over the North-eastern boundary, the President wrote:

Whether that [referring to a previous plan] or some other plan of a like kind would not now be eligible is submitted to your consideration. . . . In this instance I think it advisable to postpone any negotiations until I shall be informed of the result of your deliberations, and receive your advice as to the propositions most proper to be offered on the part of the United States.<sup>2</sup>

The Senate recommended an effort to secure prompt settlement of the dispute, and approved as an alternative choice the method which had been proposed five years before by the Secretary for the Department of Foreign Affairs.<sup>3</sup>

President John Adams's disapproval of the executive powers of the Senate, grounded on theory and on his own close observation of the Senate's action, led him to discontinue the practice of asking the Senate's prior consent in the making of treaties; nor did any successor seek such counsel until Monroe, to quiet any doubts, laid before the Senate the arrangement which had been completed by the Secretary of State and the British Minister, by an exchange of notes, for disarmament upon the Great Lakes, saying:

I submit it to the consideration of the Senate, whether this is such an arrangement as the Executive is competent to enter into by the powers vested in it by the Constitution, or is it such a one as requires the advice and consent of the Senate, and, in the latter case, for their advice and consent, should it be approved.<sup>4</sup>

The Senate advised the ratification of this agreement, and this was 'observed with the formalities of a treaty.'<sup>5</sup>

<sup>1</sup> April 1, 1792. *Jefferson Papers*, 4, II, no. 18.

<sup>2</sup> *Messages*, I, 72.

<sup>3</sup> *Senate Executive Journal*, I, 36-37.

<sup>4</sup> See Hayden, *op. cit.*, 40-53, for detailed account of correspondence with the Senate over the ransom of American captives in Algiers and the 'distressful' state of American trade in the Mediterranean.

<sup>5</sup> *Messages*, II, 36.

<sup>6</sup> *Senate Executive Journal*, III, 132, 134; J. M. Callahan, 'Agreement of 1817: Reduction of Naval Forces upon the Lakes' (*J. H. U. Studies*, 1898), 59-90; J. W. Foster, *Limitation of Armament on the Great Lakes* (Carnegie Endowment for International Peace, Division of International Law, Pamphlet 2, 1914). Foster says: 'Out

In 1830, President Jackson placed before the Senate certain proposals voluntarily brought up and submitted in the form of a treaty by the Choctaw Indians, evincing their desire to cede all the lands east of the Mississippi. In his message, Jackson said:

I am fully aware that in this resorting to the early practice of the Government, by asking previous advice of the Senate in the discharge of this portion of my duty, I am departing from a long and for many years unbroken usage in similar cases. But being satisfied that this resort is consistent with the provisions of the Constitution, that it is strongly recommended in this instance by considerations of expediency, and that the reasons which have led to the observance of a different practice, though very cogent in negotiations with foreign nations, do not apply with equal force to those made with Indian tribes, I flatter myself that it will not meet the disapprobation of the Senate.

As special reasons for his seeking 'a previous expression of the views of the Senate,' he said that the Indians themselves had requested that their propositions be submitted to the Senate; that the Senate's expressed opinion as to their terms would have a salutary effect in any future negotiation; and that the terms of a possible treaty with the powerful Choctaw tribe might be of controlling effect in treaties with other tribes. He added: 'There is also the best reason to believe that measures in this respect emanating from the united counsel of the treaty-making power would be more satisfactory to the American people and to the Indians.' He therefore put before the Senate the three questions, whether they would advise the conclusion of the proposed treaty as submitted by the Choctaws, or as modified by his own suggestions, or, 'if not, what further alterations or modifications will the Senate propose?'<sup>1</sup> The Senate did not adopt its committee's vague recommendations nor did it choose to take further action on the subject.<sup>2</sup>

In 1846, President Polk sought the 'previous advice of the Senate' — it was generally believed — as a political maneuver to extricate himself from a dilemma by throwing responsibility upon the Senate.

of abundant caution, in view of his constitutional relations to the Senate in regard to matters of foreign intercourse,' President Monroe made this communication to the Senate. Despite certain statements in his final proclamation, there is no evidence that the arrangement received on the part of Great Britain the formalities usually accorded to a treaty. No exchange of ratifications took place. Foster (pp. 20–21) cites other cases where the exchange of notes sufficed, in place of a formal treaty.

<sup>1</sup> *Messages*, II, 478–79.

<sup>2</sup> Miss C. H. Kerr, *The Origin and Development of the Senate*, 141; Madison, *Works*, IV, 370.

In his message to Congress he had declared that our title to the whole of the territory of Oregon was clear and unquestionable and that no part of it ought to be ceded to England or any other power. Apparently he early became convinced that England would not concede the claim extending to 54° 40'. As early as October 21, 1845, he told his Cabinet that if the British Minister should make any new proposition he would either reject it or submit it to the Senate before he acted on it, according to its character.<sup>1</sup> This procedure was frequently considered in meetings of the Cabinet, all of whose members agreed that if the British Government should offer 49° or its equivalent, he should refer the proposal to the Senate and take their previous counsel before he acted. He was in constant consultation with prominent Senators, of both parties, and this led him to doubt the rumor that Whig Senators had held a caucus and decided that, if the President called on the Senate for their previous advice on the Oregon question, they would not give it, but would throw the whole responsibility on the President.<sup>2</sup>

When at last the British Government made a qualified proposition for 49°, four of the Cabinet advised the President's submitting it to the Senate for their previous advice.

All agreed that if the proposition was rejected without submitting it to the Senate, that in the present position of the question I could offer no modification of it, or other proposition, and that if it was rejected and no other proposition made, war was almost inevitable.<sup>3</sup>

Accordingly, June 10, 1846, having previously notified many Senators of his intention, Polk sent in his message, transmitting the proposal

<sup>1</sup> Benton, *Thirty Years' View*, II, 675, assured Polk that many Senators would favor prior consultation in the Oregon dilemma.

<sup>2</sup> For new evidence of the pacific influence upon the 'warriors of the Western States' because of the new markets for wheat caused by the prospective and actual repeal of the British 'corn laws' and the failure of crops in England and Ireland, see T. P. Martin, *Louisville Courier-Journal* (April 15, 1923), 11. Polk apparently became convinced that neither the Northwest, which now wanted to pour its grain into England, nor the Northeast would stand for war. 'There has been a good deal of party jockeying over the Oregon boundary question, but the President pulled the Senate up sharp by inviting its advice whether he should accept or decline Great Britain's proposition to settle upon the 49th parallel. . . . The Senate shrank from advising rejection, and thus it precluded itself from blaming the Administration for the surrender of the extreme claims which demagogues in Congress had been making.'

<sup>3</sup> Polk, *Diary*.

Details of the previous discussions of this plan are given in many entries in the *Diary*, and in Benton's *Thirty Years' View*. Benton says that the Senate gave the President 'a faithful support against himself, against his Cabinet, and against his peculiar friends' (II, 676). See also E. I. McCormac, *James K. Polk: A Political Biography* (1922), 555-611.

in the form of a convention which had been submitted by the British Minister. Said the message:

In the early periods of the Government the opinion and advice of the Senate were often taken in advance upon important questions of our foreign policy. General Washington repeatedly consulted the Senate and asked their previous advice upon pending negotiations with foreign powers, and the Senate in every instance responded to his call by giving advice, to which he always conformed his action. This practice, though rarely resorted to in later times, was, in my judgment, eminently wise, and may, on occasions of great importance, be properly revived. The Senate are a branch of the treaty-making power, and by consulting them in advance of his own action upon important measures of foreign policy which may ultimately come before them for their consideration, the President secures harmony of action between that body and himself. The Senate are, moreover, a branch of a war-making power, and it may be eminently proper for the Executive to take the opinion and advice of that body in advance upon any great question which may involve in its decision the issue of peace and war.

Should the Senate, by the Constitutional majority required for the ratification of treaties, advise the acceptance of this proposition, or advise it with such modifications as they may, upon full deliberation, deem proper, I shall conform my actions to their advice. Should the Senate, however, decline by such Constitutional majority to give such advice, or to express an opinion on the subject I shall consider it my duty to reject the offer.<sup>1</sup>

This course was severely criticized by the President's opponents,<sup>2</sup> but after three days' debate the Senate by a vote of 37 to 12 advised the acceptance of the proposal. Later, when the treaty came before the Senate consent to ratification was given by 41 to 14.

At the very end of Buchanan's Administration he put before the Senate three specific questions concerning the Northwest boundary line.<sup>3</sup> Having taken no definite action on this request for advice before the change of Administration took place, the Senate, March 13, 1861, ordered the Secretary to lay before President Lincoln a copy of his predecessor's message.<sup>4</sup> In reply, President Lincoln said:

I find no reason to disapprove of the course of my predecessor in this important matter, but on the contrary, I shall not only receive the advice of the Senate therein cheerfully, but I respectfully ask the Senate for their advice on the two questions before recited.<sup>5</sup>

<sup>1</sup> Senate *Executive Journal*, VII, 84, 89–90, 95.

<sup>2</sup> Webster contemptuously referred to the settlement thus: 'In the general operation of government, treaties are negotiated by the President and ratified by the Senate; but here is the reverse — here is a treaty negotiated by the Senate, and only agreed to by the President.' *Works*, II, 322.

<sup>3</sup> Feb. 21, 1861.

<sup>4</sup> Senate *Executive Journal*, XI, 303.

<sup>5</sup> *Ibid.*, 307–08.

Although the Senate several times considered its committee's report on this message, it was finally ordered that any action upon it be indefinitely postponed.<sup>1</sup>

December 19, 1861, President Lincoln asked the Senate for advice upon a draft of a convention with Mexico, proposed by the United States Minister to that Government, providing for a loan, and emphasized reasons why the early consideration of it by the Senate was very desirable. No action having been taken upon it except to refer it to a committee, after five weeks the President sent a second message, soliciting an early action of the Senate upon the subject. Another month passed before reply was made in a resolution stating the Senate's opinion that: 'It is not advisable to negotiate a treaty that will require the United States to assume any portion of the principal or interest of the debt of Mexico or that will require the concurrence of European powers.'<sup>2</sup> Meantime there had come to the President's hands two treaties providing for the loan, which the Minister to Mexico, not having received the anxiously awaited instructions, had made and signed. These the President sent to the Senate, June 23, 1862, with a message: 'The action of the Senate is, of course, conclusive against the acceptance of the treaties on my part.'<sup>3</sup>

May 13, 1872, President Grant sent to the Senate an article supplementary to the Treaty of Washington, proposed by the British Government, and requested an expression by the Senate of their disposition with regard to advising and consenting to the formal adoption of such an article. He added:

The Senate is aware that the consultation with that body in advance of entering into agreements with foreign States has many precedents. In the early days of the Republic General Washington repeatedly asked their advice upon pending questions with such powers. . . . The importance of the results hanging upon the present state of the treaty with Great Britain leads me to follow these former precedents and to desire the counsel of the Senate in advance of agreeing to the proposal of Great Britain.<sup>4</sup>

The Senate gave its approval to the proposed article, but with an 'understanding' which proved unacceptable to the British Government.<sup>5</sup>

<sup>1</sup> Senate *Executive Journal*, XI, 357.

<sup>2</sup> *Ibid.*, XIII, 134.

<sup>3</sup> *Messages*, VI, 81-82. He ended: 'I shall cheerfully receive and consider with the highest respect any further advice the Senate may think proper to give upon the subject.' But these treaties were promptly tabled. Senate *Executive Journal*, XII, 401.

<sup>4</sup> *Messages*, VII, 166.

<sup>5</sup> Senate *Executive Journal*, XVIII, 248; 264. J. F. Rhodes, *History of the United States from the Compromise of 1850*, VI, 368-69.

February 17, 1922, in a formal message to the Senate, President Harding asked its advice whether he should revive the patents treaty with Germany of February 23, 1909, which had lapsed with the declaration of war in 1917, or should he negotiate an entirely new treaty covering the subject. Five days later, the Chairman of the Committee on Foreign Relations reported, at the end of a brief executive session, that the Senate by a two-thirds vote had given its advice and consent to the President's giving notice to revive the designated treaty.<sup>1</sup>

President Polk's action in formally requesting the Senate's advice in advance of entering upon a proposed negotiation has been described as an 'unprecedented and unique step.' On the contrary, this summary shows that it was of a piece with the cautious action that has been taken more than a score of times, through more than a century, by eleven different Presidents from Washington to Harding.

*By Securing the Senate's Action Upon the Nomination of Treaty Negotiators*

On divers occasions the President has secured the prior advice of the Senate upon a proposed negotiation by the less formal method of sending to the Senate the nominations of the envoys to whom he proposed to entrust the enterprise, together with a more or less specific statement of the instructions he planned to give them.

Thus, President Washington, January 11, 1792, sent to the Senate the nomination of the two men then serving as *chargés d'affaires* at Madrid and Paris to negotiate a treaty 'concerning the navigation of the Mississippi River by the citizens of the United States, saving to the President and Senate their respective right as to the ratification of same.'<sup>2</sup> The Senate readily gave consent to these appointments.<sup>3</sup> Presently came the report from Madrid that the negotiators found the Spanish King disposed to enter into a treaty of commerce. On Jefferson's advice that a resubmission of the matter to the Senate was necessary, Washington sent to the Senate a detailed report setting forth the instruction proposed in case the negotiators' powers were extended, and saying:

I have to request your decision whether you will advise and consent to the extension of the powers of the commissioners as proposed, and to the ratification of a treaty which shall conform to those instructions, should they enter into such a one with that court.<sup>4</sup>

<sup>1</sup> Feb. 22, 1922, *Cong. Rec.*, 2897.

<sup>2</sup> *Senate Executive Journal*, I, 95.

<sup>3</sup> *Ibid.*, 99.

<sup>4</sup> *Ibid.*, 106.

The Senate gave its approval to the extension of powers, and its pledge of ratification.<sup>1</sup>

In sending to the Senate April 16, 1794, the nomination of John Jay as 'envoy extraordinary of the United States to his Britannic Majesty,' President Washington did not communicate his instructions, but referred to previous communications as to 'the serious aspect of our affairs with Great Britain,' and added:

A mission like this, while it corresponds with the solemnity of the occasion, will announce to the world a solicitude for friendly adjustment of our complaints and a reluctance to hostility.<sup>2</sup>

After long debate and the defeat of a resolution asking the President to inform the Senate of 'the whole business' with which the envoy would have to deal, the nomination was confirmed.<sup>3</sup>

When our relations became critical in the spring of 1797, President Adams sent to the Senate the nomination of C. C. Pinckney, Francis Dana, and John Marshall,

to be jointly and severally envoys extraordinary and ministers plenipotentiary . . . to negotiate with the French Republic to dissipate umbrages, to remove prejudices, to rectify errors, and to adjust all differences between two powers.<sup>4</sup>

The Senate promptly confirmed these nominations.<sup>5</sup>

At a later period President Van Buren was led to pursue an exceptionally cautious course by his own intimate acquaintance with the Senate's point of view. He had been a Senator; had undergone the humiliation of being recalled from his position of Minister to the Court of St. James through the Senate's failure to confirm his recess appointment; and had later for four years been President of the Senate. Accordingly, when, in 1838, he wished to authorize the newly appointed Minister to Peru to stop *en route* to attend to negotiations

<sup>1</sup> Senate *Executive Journal*, I, 115.

<sup>2</sup> *Ibid.*, 150; *Messages*, I, 153-54. For detailed account of these preliminaries, see S. F. Bemis's admirable discussion, *Jay's Treaty* (1923). The relations between the President and the Senate in this critical enterprise are well summarized by Ralston Hayden, *op. cit.*, 58-94.

<sup>3</sup> Senate *Executive Journal*, I, 150-52.

<sup>4</sup> *Messages*, I, 245.

<sup>5</sup> Senate *Executive Journal*, I, 243, 245.

See J. Q. Adams's message of Dec. 26, 1825 (*ibid.*, III, 457), submitting nominations of envoys to the Panama Congress, the invitation to be represented at which he had assumed to accept on behalf of the United States, without getting the advice of the Senate. This gave rise to weeks of heated debate before the nominations were finally confirmed, March 15, 1826. *Report of Committee on Foreign Relations*, *ibid.*, 473-90.

for a treaty of commerce with Ecuador, in his message explaining the designation of the Minister for this purpose he said:

Desiring in this and in all instances to act with the most cautious respect to the claims of other branches of the Government, I bring this subject to the notice of the Senate that, if it shall be deemed proper to raise any question, it may be discussed and decided before and not after the power shall be exercised.<sup>1</sup>

For more than a century our treaties have generally been negotiated, not by envoys whose nominations for the purpose have been submitted to the Senate for confirmation, but by the Secretary of State, by members of the regular diplomatic or consular service, or by special agents 'empowered and commissioned to negotiate the treaty by the President without special confirmation for this purpose by the Senate.'<sup>2</sup>

The sending of private envoys or agents dates from the first year of government under the Constitution.<sup>3</sup> During the First Congress Washington more than once sent men to Europe on confidential missions, and allowed many months — even a year — to elapse before informing the Senate whom he had sent, what instructions had been given to these envoys, and what results had been obtained.<sup>4</sup> Some Senators regarded this as a distinct breach of courtesy to the Senate.<sup>5</sup>

From time to time criticism was directed against such appointments. In 1831, John Quincy Adams wrote:

Jackson has not only repeated all my sins in this matter but suffered the whole session of Congress to pass without nominating his commissioners [for negotiating the treaty with the Sublime Porte] to the Senate, and finally signed the treaty concluded by them without nominating them at all.<sup>6</sup>

At that moment this action of the President was being roundly denounced in the Senate as a usurpation of powers not given by the Constitution. Senator Tazewell laid special stress upon the fact that the commissioners were appointed during the recess of the Senate and that they were sent to negotiate a treaty with the Government

<sup>1</sup> Senate *Executive Journal*, V, 119, 302. The Senate agreed to such a treaty.

<sup>2</sup> S. B. Crandall, *Treaties*, 76.

<sup>3</sup> Senate *Executive Journal*, I, 37.

<sup>4</sup> *Ibid.*, 96; Hayden, *op. cit.*, 59–61.

<sup>5</sup> Maclay, *Journal*, 385.

<sup>6</sup> *Memoirs*, VII, 321.

with which the United States had no diplomatic relations.<sup>1</sup> Senator Smith rejoined:<sup>2</sup>

In all but one of the administrations the same act has been done. All the Presidents have then been violators of the Constitution; the Senate, also, for every Senate has sanctioned the violation.

The bill was finally amended to include an appropriation to compensate the commissioners, but accompanied by the assertion:

*Provided, always,* That nothing in this act contained shall be construed as sanctioning, or in any way approving, the appointment of these persons by the President alone, during the recess of the Senate, and without their advice and consent as commissioners to negotiate a treaty with the Ottoman Porte.<sup>3</sup>

Three years later, June 30, 1834, after the Senate had given consent to two treaties, Senator Tyler introduced a resolution to the effect that while the Senate 'had thought it expedient under all the circumstances' to take this action,

It feels itself constrained by a high sense of its constitutional duty to express its decided disapprobation of the practice of appointing diplomatic agents to foreign countries by the President alone, without the advice and consent of the Senate.<sup>4</sup>

But on motion of Daniel Webster the resolution was at once laid on the table.

Nearly forty years passed before the Senate again was roused to formal protest, which this time took the form of a paragraph introduced into its resolution consenting to the ratification of a treaty with Korea, negotiated by Commodore Shufelt, personally delegated by the Executive.

*Resolved further,* That the Senate in advising and consenting to the treaty mentioned in the foregoing resolutions does not admit or acquiesce in any right or constitutional power in the President to authorize or empower any person to negotiate treaties or carry on diplomatic negotiations with any foreign power, unless such person shall have been appointed for such purpose, or clothed with such power, by and with the advice and consent of the Senate, except in the case of the Secretary of State or diplomatic officer appointed by the President to fill a vacancy occurring during the recess of the Senate, and it makes the declaration

<sup>1</sup> *Congressional Debates*, VII, 215.      <sup>2</sup> *Ibid.*, 307.

<sup>3</sup> *Ibid.*, 310. In his valuable treatise, *Executive Agents in American Foreign Relations*, 237-58, Professor Henry M. Wriston summarizes this Senate debate of 1831, which he considers the ablest discussion of the matter, up to that date.

<sup>4</sup> *Senate Executive Journal*, IV, 413; 445.

in order that the means employed in the negotiation of said treaty be not drawn into a precedent.<sup>1</sup>

But this emphatic protest left no lasting impression. In 1886, President Cleveland sent a special commissioner to Mexico, whose sensational actions so affronted the American Minister to that country that he resigned, causing such a controversy that the Senate requested the President to transmit the correspondence relating to the resignation, a request with which he declined to comply as incompatible with the interests of the public service. In 1888, President Cleveland's appointment, without confirmation,<sup>2</sup> of James B. Angell and William L. Putnam with Secretary Bayard as members of the commission to adjust the Canadian fisheries controversy led Senator Chandler to introduce a resolution declaring:

The President has no right, under his implied powers of making preliminary negotiations of treaties, to appoint, without the concurrence of the Senate, private citizens as plenipotentiaries to make and sign such treaties in behalf of the United States.

It specifically declared that the two recent appointments were 'unwarranted by the Constitution.'<sup>3</sup> The Committee on Foreign Relations brought in a report against the ratification of this treaty, protesting against the President's declining to communicate the papers and detailed information requested by the Senate, and denouncing the assumption that the Senate 'has no right to be informed confidentially, of the course of negotiation and discussions and the various propositions and arguments pro and con arising in the negotiation of a treaty.'<sup>4</sup> The Democratic minority members, headed by Senator Morgan, on the other hand, advised ratification, asserting that there was no fault in the manner of negotiating this treaty, that the President had not in any way exceeded his constitutional powers, or withheld any courtesy due to the Senate in respect of the

<sup>1</sup> Senate *Executive Journal*, XXIII, 585; Crandall, *Treaties*, 77-78.

<sup>2</sup> 49th Congress, 2d sess., S. Exec. Doc. 109; J. W. Foster, *op. cit.*, 200.

<sup>3</sup> July 20, 1888, *Cong. Rec.*, 6568.

<sup>4</sup> Submitted, May 10, 1888, Senate *Executive Journal*, XXVI, 257. It is to be noted that here all that was being claimed was the 'right to be informed confidentially of the course of negotiation,' etc. In the debate on the London Conference Treaty for Limitation of Armament, in July, 1930, Johnson 'scorned' the proposal that Senators be allowed to see papers in confidence, and demanded for every member of the Senate the right to see the documents in question and to utilize them in public debate. Needless to say that McKellar and Johnson were clamoring for a procedure in handling treaties very different from that intended by the framers of the Constitution, as interpreted by Hamilton and Jay, in the *Federalist*.

agents selected by him to conduct the negotiations. They declared:

The constitutional power of the President to select the agents through whom he would conduct such business is not affected by the fact that the Senate is or is not in session at the time of such appointment, or while the negotiation is being conducted, or the fact that he may prefer to withhold, even from the Senate, or from other countries, the fact that he is treating with a particular power or on a special subject.<sup>1</sup>

During his second Administration President Cleveland raised a storm of protest by his appointment of J. H. Blount, without confirmation, as special commissioner with 'paramount' authority in all matters affecting relations with the Government of the Hawaiian Islands. Republican members of the Committee on Foreign Relations declared:

The appointment . . . is an unconstitutional act, in that such appointee, Mr. Blount, was never nominated to the Senate, but was appointed without its advice and consent, although that body was in session when such appointment was made, and continued to be in session for a long time thereafter.<sup>2</sup>

On the other hand, the committee's report, by Senator Morgan, declared:

Many precedents could be quoted to show that such power has been exercised by the President on various occasions without dissent on the part of Congress or the people of the United States. The employment of such agencies is a necessary part of the proper exercise of the diplomatic power which is entrusted by the Constitution with the President. Without such authority our foreign relations would be so embarrassed with difficulties that it would be impossible to conduct them with safety or success.<sup>3</sup>

<sup>1</sup> S. Doc. 231, 56th Cong., 2d sess., VIII, 332-62. In an appendix is presented what purports to be a complete list of appointments of diplomatic agents to negotiate conventions, treaties, and agreements prior to June 25, 1887. While not without some inaccuracies, this list shows how prevalent this practice had become, indicating that 438 persons had been appointed or recognized by the President without action of the Senate or express authority from Congress; three had been appointed by the Secretary of State and thirty-two by the President with the advice and consent of the Senate — twenty-nine prior to 1828; while fifty-two years ensued before the three remaining nominations were submitted for confirmation. (Crandall, *op. cit.*, 76, n. 52.) Such agents are usually paid from the secret-service fund annually voted by Congress to the Department of State.

<sup>2</sup> Remarks of Sherman, Frye, Dolph, and C. K. Davis, *Cong. Rec.*, 2420, Feb. 26, 1894. Professor Wriston (*op. cit.*, 292-308) considers this the most satisfactory constitutional discussion of executive agents that had been heard for sixty years. Hoar took the lead in declaring the appointment of Blount unconstitutional; Gray, on the other hand, insisted that Blount had no 'office,' but only employment.

<sup>3</sup> *Cong. Rec.*, 2417. Feb. 26, 1894.

The practice of negotiating treaties by special agents has continued in frequent use. President Wilson made ex-Governor John Lind of Minnesota his special agent in negotiations with Mexico, and sent Colonel Edward M. House to Europe upon many most important diplomatic missions after the outbreak of the World War.<sup>1</sup>

In similar fashion, without Senate confirmation, Norman H. Davis was designated by President Roosevelt, not only to head the World Economic Conference in London in 1933, but for months before that conference assembled — under a 'roving commission' but with the rank of Ambassador — to represent the President in conferences with statesmen in charge of foreign affairs in divers European capitals.

#### *By Making Senators Official Parties to the Preliminary Negotiation*

In recent years not a little attention has been called to what is said to be the growing practice of the President's commissioning Senators as treaty negotiators with a view to securing friends for the treaty when it shall later come before the Senate. The first such appointment was made more than a century ago. During a recess of the Senate, April 7, 1813, Senator James A. Bayard of Delaware received and at once accepted President Madison's proposal that he serve with John Q. Adams and Albert Gallatin in negotiating a treaty with England. The press criticized the choice of a Senator for this position. Recognizing some basis for this criticism, Bayard had no sooner received his commission than he sent to the Governor of Delaware his resignation, 'as the acceptance of the appointment is on my part an implied and virtual resignation of my seat in the Senate.'<sup>2</sup> A similar question as to the propriety of appointing men of influence in Congress as treaty negotiators was raised when Madison included in his list of commissioners to negotiate a treaty of peace with the British Government 'James A. Bayard, late a Senator of the United States,' and, 'Henry Clay, Speaker of the House of Representatives of the United States.'<sup>3</sup> The day following the confirmation

<sup>1</sup> It will be noted that Blount, Lind, and House did not negotiate treaties, but were mainly engaged in conveying and obtaining information. For further instances of treaties negotiated by special agents, see Crandall, *Treaties*, 77-78, n. 57, and his citations to statement by Sherman, in Senate, Aug. 7, 1888, *Cong. Rec.*, 7285; Foster, *op. cit.*, 199-203. Of highest value is H. M. Wriston's *Executive Agents in American Foreign Relations* (1929).

<sup>2</sup> American Historical Association (1913), *Papers of James A. Bayard*, 221; letter dated May 3, 1813.

<sup>3</sup> *Ibid.*, 255. Bayard's credentials were signed Jan. 18, 1814.

of these appointments by the Senate, Henry Clay resigned his membership in the House. Former Ambassador John W. Davis commented upon these appointments:

They [Bayard and Clay] were impressed, however, with the fact that such a service would impose upon them a double duty: To their colleagues at the Conference, to respect any confidences that might there be confided to them, and with their associates in Congress, to disclose all matters within their knowledge. Accordingly, both resigned from Congress before entering formal duties as Commissioners.<sup>1</sup>

At the end of the war with Spain, President McKinley, schooled in dealing with Senate opposition by many years of observation in the House, delegated the negotiating of the treaty of peace to five commissioners, whose names he did not submit to the Senate for confirmation, and chose three out of five, not only from the Senate, but from its Committee on Foreign Relations. This action, in connection with the unprecedented extent to which he had already named Senators as members of commissions for investigating conditions abroad,<sup>2</sup> led to severe criticism in the Senate and to the introduction of bills and resolutions some of which were referred to the Committee on the Judiciary.<sup>3</sup> It then was noted that the tactful President had selected three of that committee's members to serve on the International Water Boundary Commission. Loath to make a report which might be construed as a censure of their fellow Senators, whose qualifications for service in these several positions were in some cases distinguished, the committee instructed its chairman, Senator Hoar, to call upon the President and say to him that they hoped that the practice would not be continued. Senator Hoar wrote of that interview:

President McKinley said he was aware of the objections; that he had come to feel the evil very strongly; and while he did not say in terms that he would not make another appointment of the kind, he conveyed to me, as I am sure he intended to, the assurance that it would not occur again. He said, however, that it was not in general understood how few people there were in this country, out of the Senate and House of Representatives, qualified for important diplomatic service of that kind, especially when we had to contend with the trained diplomatists of Europe who had studied such subjects all their lives.<sup>4</sup>

<sup>1</sup> *The Treaty-Making Powers in the United States*, 11.

<sup>2</sup> For example, on the committee to visit Hawaii; the Wolcott Commission to investigate the possibility of international-bimetallism; and the International Water Boundary Commission.

<sup>3</sup> 56th Cong., 1st sess. S. 333; 57th Cong., 2d sess., *Cong. Rec.*, 2695 ff.

<sup>4</sup> *Autobiography*, II, 51.

On many occasions Senator Hoar opposed this method of securing senatorial favor, insisting:

It places the Senator so selected in a position where he cannot properly perform his duties as Senator. He is bound to meet his associates at the great National Council Board as an equal, to hear their reasons as well as to impart his own. How can he discharge that duty, if he had already not only formed an opinion, but acted upon the matter under the control of another department of the Government?<sup>1</sup>

As a practical illustration of what to him seemed the deplorable results of this blurring of functions he declared:

In my opinion, the treaty [with Spain, 1899] would have been lost, if Senator Gray, one of the Commissioners who made it, who earnestly protested against it, but afterwards supported it, had not been a member of the Commission.<sup>2</sup>

As a publicist Woodrow Wilson had again and again emphasized the desirability of the close and sympathetic co-operation between the President and the Senate in treaty-making, and had stressed the President's opportunity and duty to take the initiative in promoting intimate relations of mutual confidence.<sup>3</sup> But at the close of the World War not only did he not place Senators as such liaison officers upon the commission which he took with him to Paris, but he consented to, if indeed he did not personally instigate, an interweaving of the Treaty and Covenant of the League, which he had every reason to know would be obnoxious to a majority of the Foreign Relations Committee and to a portion of the Senate large enough to reject the treaty.<sup>4</sup>

Warned by his predecessor's calamitous experience, which he had watched from the table of the Senate Committee on Foreign Relations, President Harding turned back to the precedents set by McKinley; he kept himself out of treaty negotiation, and upon the United States delegation at the Washington Conference as colleagues of his Secretary of State he named Senator Lodge, Republican Chairman of the Com-

<sup>1</sup> *Autobiography*, II, 50.

<sup>2</sup> *Ibid.*, II, 110; 313-15.

John Hay wrote to a friend in May, 1898: 'I have told you many times that I did not believe another important treaty would ever pass the Senate.... The man who makes the treaty of peace with Spain will be lucky if he escapes lynching.' Thayer, *Life of John Hay*, II, 170.

<sup>3</sup> See his *Constitutional Government in the United States* (1911), 139-40; and *infra*, pp. 994-95.

<sup>4</sup> The precedents as to Senators' serving as members of treaty commissions were discussed in the Senate on the eve of the Paris Conference, Dec. 4, 1918. *Cong. Rec.*, 79-83.

mittee on Foreign Relations, and Senator Underwood, official leader of the Democratic minority. Yet with all this tactfulness of approach, it was only so as by fire that the treaties negotiated at that conference escaped rejection by the Senate.<sup>1</sup> At the London Conference on Limitation of Naval Armament Senators Reed (Republican) and Robinson (Democrat) were members of the delegation representing the United States.<sup>2</sup>

*By Requesting an Appropriation for the Proposed Negotiation*

The President may test the Senate's attitude toward a proposed treaty, not only by submitting the names of the negotiators for confirmation, but also by requesting an appropriation for carrying on the negotiation. Of course the House would have to join in such an appropriation; but the Senate's vote upon the bill, if either grudging or negative, might indicate such hostility to the enterprise as to lead to its abandonment. In recent years the contingent funds annually voted to the Department of State afford leeway, so that special requests of this character are not likely to be made. But in 1803 and again in 1806 the Senate concurred with the House — after much debate in secret session — in passing bills, framed in accordance with the known wishes of the President to appropriate sums of money under such phrases as, 'for the purpose of defraying any extraordinary expenses which may be incurred in the intercourse between the United States and foreign nations.' The object in the first instance was to enable the President to obtain the cession of New Orleans, and in the second that of Florida.<sup>3</sup> The special purpose did not appear on the face of either bill, and, citing these precedents, President Polk, August 4, 1846, sent a special message to the Senate, recommending the passage of a law appropriating such sum as Congress might deem adequate, to be used by the Executive, if necessary, for the purpose of securing an adjustment of the boundary line between the United States and Mexico.<sup>4</sup>

<sup>1</sup> Page 705.

<sup>2</sup> Page 184.

<sup>3</sup> *Annals of Congress*, 2d sess., 7th Cong., 90; 104. See William Plumer's *Memorandum*, for account of the debates over these 'Confidential Bills.'

Jefferson in his message of 1803 referred to the appropriation of \$2,000,000 as considered by him to convey 'the sanction of Congress to the acquisition proposed.' 8th Cong., 1st sess., *Annals of Congress*, 12; Senate *Executive Journal*, II, 36-43.

<sup>4</sup> *Ibid.*, VII, 132-33. The Senate passed resolutions advising the President to adopt all proper measures for terminating the war by a treaty of peace, and declaring that the Senate deemed it advisable that Congress appropriate a sum of money to enable him to conclude a treaty of peace, limits, and boundaries (p. 137).

*By Conference with the Committee on Foreign Relations and with Individual Senators*

Another method by which the President secures 'prior advice' is by keeping himself informed of sentiment by conference with individual members, and especially with the Chairman of the Committee on Foreign Relations, whom James Bryce described as in effect 'a kind of Secretary of State.' Long before such a standing committee came into existence, Presidents took counsel with recognized leaders to whom the Senate was constantly referring matters relating to foreign affairs. Preliminary steps leading up to Jay's mission in 1794 are an excellent illustration of this close counsel-taking — indeed, in this instance it might almost be said that a self-constituted 'Senate Committee on Foreign Relations' really took the initiative. Washington himself referred to Ellsworth, Cabot, Strong, and King as 'the gentlemen with whom I usually advise on these occasions.'<sup>1</sup> Investigation shows these four Federalist Senators to have been 'more influential than any other members of the Upper House in determining the action of that body in foreign affairs during the whole of Washington's administrations,' and they 'dominated the entire proceedings.'

It was they who suggested the Jay mission; they secured its acceptance by the President, and practically directed the selection of the envoy; they secured his confirmation by the Senate; they sent him out fully cognizant with their views as to what sort of a treaty should be striven for and under very flexible instructions from the Department of State.<sup>2</sup>

Polk's *Diary* shows that he discussed the Oregon question with at least a score of Senators before taking the more formal step of asking the advice of the Senate as a body upon the advisability of making Great Britain's offer the basis for further negotiations. During Grant's first Administration Secretary of State Fish deemed it hopeless to renew negotiations for a treaty with Great Britain after the almost unanimous rejection of the Johnson-Clarendon Convention, until by conference with Senate leaders and especially with Charles Sumner, Chairman of the Committee on Foreign Relations, he had sought to reach a greater accord on what should be attempted.<sup>3</sup> President McKinley did not trust to his having drafted three Senators from the Foreign Relations Committee into the treaty conference in

<sup>1</sup> Washington, *Writings*, XII, 419; letter to Randolph, April 16, 1794.

<sup>2</sup> R. Hayden, *op. cit.*, 92; S. F. Bemis, *Jay's Treaty*, 193; 196–97; *Life and Correspondence of Rufus King*, I, 517–19.

<sup>3</sup> J. B. Moore, *History and Digest of International Arbitrations*, I, 525.

1898, but sought conference with divers others. Summoning Senator Hoar to the White House, he asked his advice as to whether it would be wise for him to have a personal interview with Senator Morrill, who was said to be opposed to the treaty. He said:

I do not quite like to try to influence the action of an old gentleman like Mr. Morrill, so excellent and of such great experience. It seems to me that it might be thought presumptuous, if I were to do so. But it is very important to us to have his vote, if we can.

At that point he tactfully intimated that he understood Senator Hoar was in favor of the treaty.<sup>1</sup>

In 1906, the Senate's share in preliminary negotiations was the subject of keen debate between Senators Bacon and Spooner, occasioned by the former's introduction of a resolution asking information concerning the instructions given to delegates appointed to the Algeciras Conference. More than any other Secretary of State John Hay was wont to bewail the death or mutilation which treaties had to undergo in the Senate Chamber. Senator Bacon's testimony indicates the extreme pains which the Secretary took to avoid such contingencies by previous conference with Senators:

I recollect two treaties in particular.... I think he conferred with every Senator in this Chamber either in writing or in person, as to the General Arbitration Treaty.... He certainly conferred with me, not once but several times, and I presume he did the same with other Senators, not simply as to the question whether a treaty should be negotiated, but as to what provisions should be incorporated in it.... He conferred with Senators before he formulated the treaty, not simply before the President sent it here, not simply before it was negotiated with Sir Mortimer Durand and the Ambassadors of other countries, but before it had been formulated. Then as to another, I recollect distinctly the Alaskan treaty. Time after time, and time after time Mr. Hay... conferred with Senators, and I presume with all Senators, as to the propriety of endeavoring to make that treaty and as to the various provisions which should be incorporated in it, recognizing the delicacy of the situation, and the provisions of that treaty were well understood by members of the Senate and approved by members of the Senate before it was ever formulated and submitted to Sir Michael Herbert.<sup>2</sup>

<sup>1</sup> *Autobiography*, II, 307. Hoar interjected: 'I ought to say, Mr. President, that I feel very doubtful whether I can support it myself.'

<sup>2</sup> *Cong. Rec.*, XL, part 3, 2129-30, Feb. 6, 1906. This occurs in a speech which formed part of a notable debate over the treaty-making power of the President and of the Senate occasioned by President Roosevelt's autocratic action as to Santo Domingo. Senator Bacon's principal speech is found on pp. 2125-48; Senator Spooner's, on pp. 1417-21. The debate is summarized in E. S. Corwin, *The President's Control of Foreign Relations*, 168-204, and in P. S. Reinsch, *Readings in American Federal Government*, 81 ff.

In submitting the Treaty of Versailles to the Senate, July 10, 1919, President Wilson said that he wished to place his services and all the information he possessed freely at the disposal of the Committee on Foreign Relations. But many weeks passed before the committee showed any disposition to confer with him. In the later stages of the controversy, the President was in frequent conference with members of that committee and with other Senate leaders.<sup>1</sup>

#### THE SENATE'S PART IN SUPPLEMENTARY NEGOTIATIONS

I now transmit to the Senate that treaty and other documents connected with it. They will, therefore, in their wisdom decide whether they will advise and consent that the said treaty be made between the United States and His Britannic Majesty.

Such were the closing words of the message of June 8, 1795, with which President Washington sent to the Senate the treaty negotiated by John Jay, whose nomination they had confirmed, but whose instructions they had never seen.

What may the Senate do with 'a project for a treaty' which has thus been laid before them? Conceivably they may ignore it altogether, not even according to it the scant courtesy of reference to a committee. For, just as it lies within the President's option whether he will initiate negotiations at all and whether he will lay before the Senate the resultant draft after it has been signed, so it lies within the Senate's free choice to determine, not only whether that proposed treaty shall be 'made,' but also the procedure by which advice and consent shall be given or withheld. In the Senate's treaty-making, silence does not 'give consent.'

#### *Unconditional Consent*

The frequency and the importance of the treaty modifications which the Senate has effected, especially in the years since the World War, should not distract attention from the fact that those treaties which have been accepted by the Senate by the adoption of the simple resolution of advice and consent have vastly outnumbered — by

<sup>1</sup> Lodge gave a list of fifteen Republican Senators whom, according to public statement, President Wilson summoned individually to the White House, trying to persuade them to vote for the treaty as it stood. From them all he received the reply that the treaty could not possibly pass without some reservations. (*The Senate and the League of Nations*, 157.) See Lodge's haughty reply to what he considered a Wilsonian 'trap' — the cablegram from Henry White (*ibid.*, 128).

nearly four to one — those that have been defeated or in the slightest degree modified by the Senate.<sup>1</sup>

<sup>1</sup> In 1935 the Department of State issued a complete list of treaties classified as follows:

LIST OF TREATIES SUBMITTED TO THE SENATE, 1789-1934

Class 1, Accepted by the Senate	682
Class 2, Amended by the Senate	173 <sup>a</sup>
Class 3, Rejected by the Senate	15 <sup>b</sup>
Class 4, Withdrawn by the President	21
Class 5, No final action	71 <sup>c</sup>
Class 6, Transmitted for information only	7
Total	969 <sup>d</sup>

The following explanations should be carefully noted:

<sup>a</sup> 'Amendment' here includes reservations, conditions, or qualifications of any kind.

<sup>b</sup> This includes only 'rejected treaties' that were 'returned to the President.'

<sup>c</sup> All of these that had been submitted prior to 1923 were obsolete at the time this list was compiled. That leaves but 12 which were then pending. (List, 94.)

<sup>d</sup> The items of the list are actually 928 in number. The excess of 41 in the total, 969, as printed above, is accounted for by the fact that various items of the list have more than one class noted in the classification column.'

'What Has the Senate Done with Treaties?' In summary answer to this question, Professor Dangerfield (*op. cit.*, 256) presents the following statistics:

Treaties signed by the United States, 1788-1928	820
Never submitted to the Senate	24
Withdrawn by the Executive	9
Came before the Senate for approval,	33
	787

Never acted upon	47
Rejected	15
Amended	162

From this statement he draws the conclusion: 'In other words, the Senate tampered in the making of 234 treaties.' The arithmetical summation is not quite clear; nor does the sweeping term 'tampered,' as covering the Senate's record of action and non-action in modifying or ignoring treaties seem appropriate in a book bearing the title, *In Defense of the Senate*. The Senate has its constitutional rights as to treaty-making. It only 'tampers' or 'interferes' when its professed exercise of those rights is (in the opinion of the critic!) unworthy or unpatriotic in object or in method.

The Department of State in 1932 issued a *List of 'Unperfected' Treaties* — of treaties submitted to the Senate between March 4, 1789, and March 4, 1931, which did not go into force prior to October 1, 1932.

What has happened to these 'unperfected' treaties is summarized as follows:

Accepted by the Senate	45
Amended by the Senate	57
Rejected by the Senate	12
Withdrawn	17
No final action	91
Transmitted for information only	6
	228

(The actual number of items was 223 — five of them having been twice submitted to the Senate.)

'UNPERFECTED' TREATIES

Since the signing of the Treaty of Versailles the contests between the President and the Senate over treaties have been so prolonged and hard-fought and their issues have so vitally affected this country's relations with other great powers that world-wide attention has been centered as never before upon the treaty-making procedure of the United States. At home and abroad this has been the theme of a tremendous volume of editorials and magazine articles. Within a period of three years there were published

*Consent with Amendments or Conditions*<sup>1</sup>

Jay's Treaty was the first to the ratification of which the Senate qualified its consent by a condition. Since Washington's abandonment of direct conference with the Senate in the framing of treaties, his general practice had been to consult with the Senate by message as to the general features of the proposed agreement, or to send to the

three notable 'studies of the struggle between President and Senate over the conduct of foreign relations.' Denna Frank Fleming, *The Treaty Veto of the American Senate* (1930); Royden J. Dangerfield, *In Defense of the Senate* (1932); W. Stull Holt, *Treaties Defeated by the Senate* (1933). Before the appearance of the first of these studies the present writer had completed in tentative form for this book his own study of the Senate's record in treaty-making, from 1789 to 1930. This particular field has now been subjected to such intensive cultivation that in a book dealing in general with the Senate's development and practice it seems unnecessary to give to this topic as extended treatment as was originally planned.

The above-quoted State Department *List of Treaties Submitted to the Senate*, 1789–1935, which may claim to be both complete and authoritative, inevitably becomes the starting-point for new studies of the Senate's treaty record. It is not to be expected that several students approaching this topic independently would adopt precisely the same lines of classification. As a result, their tabulations or groupings will not absolutely agree. For example, most students would have been glad to see indicated in the above tabulation how many of the treaties 'amended by the Senate' failed to go into effect. Dr. Tansill showed how inaccurate was the much-quoted compilation which Senator Lodge had used. Dr. Dangerfield supplies more recent details. In some classifications (as in the above list) treaties modified by reservations are not discriminated from those changed by amendment; but to the present writer the transition from the one technique to the other seems of considerable historical significance. Nor do students agree as to the heading, 'Rejected by the Senate.' For example, a considerable number of treaties which to the layman's point of view had been conclusively 'rejected' are here placed in 'Class 5, No final action,' because, after the adverse vote by which ratification was blocked, the Senate had not returned the documents to the President. Thus, in the case of the Treaty of Lausanne (General Relations, with Turkey) the resolution of advice and consent, with reservations, failed in the Senate, Jan. 18, 1927, yeas 50, nays 34. It was not then returned to the President. Seven years later it was withdrawn by President F. D. Roosevelt, Jan. 15, 1934. In the case of 'adhesion to the World Court,' the resolution of advice and consent, with reservations, failed in the Senate, Jan. 29, 1935, yeas 52, nays 36 (p. 712), but no order of return to the President was made, and the instruments remain in the Senate. June 15, 1844, on recommendation from the Committee on Foreign Relations that the German Zollverein reciprocity treaty be rejected, the Senate tabled it by a vote of 26 to 18. This treaty is therefore classed under 'No final action,' but a member of the committee declared that in tabling the treaty the Senate had taken that mode of defeating it 'as the most conformable to the courtesy due to the parties to it.' Congress was to end its session two days later, and the treaty would lapse before the next session.

Dr. Dangerfield's tabulation of 'Delayed Treaties' by definition is confined to such a restricted class that on that point his *In Defense of the Senate* is not realistic. By his title, *Treaties Defeated by the Senate*, Dr. Holt allowed himself more scope. With great skill he has marshaled material of most varied kinds in his search for the motives and the influences which led to the defeat of treaties, whether that end was accomplished by a direct adverse vote on the question of ratification, by destructive amendments, or interpretive reservations, by delay or by utter ignoring of the treaties submitted by the President.

<sup>1</sup> 'Speaking strictly, the Senate cannot amend a treaty. But it can propose such amendments and such amendments become parts of the instrument when accepted by the President and by the foreign government concerned.' J. M. Mathews, *op. cit.*, 154.

Senate the nomination of the negotiators, and the instructions under which they were to act. But Jay's nomination had not been accompanied with the instructions,<sup>1</sup> and only the most brief and general statement had been made as to the objects of his mission. On previous occasions the Senate had given its advice and consent upon the basis of a special committee's report that the given treaty conformed to the instructions already approved by the Senate. This treaty negotiated by Jay called for a new determination, by a Senate uncommitted to its approval. The proposal to amend the treaty apparently originated, not with the foes of the treaty, but with its friends. Hamilton, whose insistence upon the necessity of better relations with Great Britain had led to the sending of Morris on his futile mission, and who had been active in the deliberations which led to Jay's commission, wrote to both Senator Bradford and Senator King that the commercial agreement in the treaty was so unsatisfactory that he 'preferred a conditional ratification to an unqualified acceptance of the instrument.'<sup>2</sup> Rufus King is said to have been the one who introduced the resolution giving the Senate's advice and consent to the treaty 'on condition that there shall be added to the said treaty an article whereby it shall be agreed to suspend the operation of so much of the 12th Article' as related to the trade between the United States and the British West Indies.<sup>3</sup> For five days this resolution was under heated debate. An attempt to add a recommendation for further negotiations to secure compensation for Negroes and other American property carried from the country in violation of the Treaty of 1783 was defeated by vote of 12 to 15.

<sup>1</sup> April 21, 1794, King, Ellsworth, Cabot, and Hamilton had had a conference, at which 'all agreed that as the President might give instructions without consulting the Senate, it would be most advisable so to conduct the business, and that the treaty, if any should be formed, should be signed subject to the approbation of the Senate.' (*Life and Correspondence of Rufus King*, I, 523.) Jay's confirmation was secured only after several days of debate, during which the Senate had called upon the Secretary of State for a copy of Jay's report of Oct. 17, 1786, and had defeated a resolution requesting the President to 'inform the Senate of the whole business with which the proposed envoy is to be charged,' and another denouncing the special mission as inexpedient, unnecessary, and extravagant, and specifically declaring that such an appointment of a Justice of the Supreme Court is 'contrary to the spirit of the Constitution, and, as tending to expose them to the influence of the Executive, is mischievous and impolitic.' *Senate Executive Journal*, I, 150-52.

For the background of Jay's mission, see Samuel F. Bemis's *Jay's Treaty*, especially 193-97; 210-16.

<sup>2</sup> Hamilton, *Works*, X, 99.

<sup>3</sup> Hayden, *op. cit.*, 76, n. 4. Hayden's excellent account is followed in this brief summary.

The first major attack by the treaty's opponents, led by Burr, took the form of a resolution:

That the further consideration of the treaty . . . be postponed, and that it be recommended to the President of the United States, to proceed without delay to further friendly negotiations with His Britannic Majesty, in order to effect alterations in the said treaty in the following particulars.<sup>1</sup>

The seven alterations therewith submitted amounted to the amendment or excision of ten articles in the treaty then before the Senate and would have made its ratification by Great Britain absolutely impossible.<sup>2</sup> The rejection of this Burr resolution by a vote of 20 to 10 marked, not simply a critical turning-point in the history of this treaty, but established an important precedent in American treaty-making. Although there is no indication that its defeat was based on the belief that there was any impropriety in recommending that the President make a new treaty along lines suggested by the Senate, its passage would probably have modified the later development and exercise of the Senate's powers.

At the very least, it would have suggested forcibly the expediency of always consulting them before opening negotiations. It might also have led the Senate to expect such consultation and thus have made it easier for Senators or groups of Senators to demand it.<sup>3</sup>

Two days later the opponents of the treaty made their last attack in the form of a resolution, in substance as follows:

That the President of the United States be informed that the Senate will not consent to a treaty, for seven reasons which were enumerated; ending, however, with the advice 'that the President continue his endeavors, by friendly discussion with His Britannic Majesty, to adjust all real causes of complaint between the two nations.'<sup>4</sup>

Upon the decisive defeat of this proposal, the vote was taken upon the original resolution. By exactly the majority required by the Constitution, 20 to 10, the conditional advice and consent to ratify were given, and by unanimous vote the Senate recommended that the President 'proceed without delay to further negotiations with His Majesty, upon the subject of the said trade, and of the terms and conditions in question.'<sup>5</sup>

<sup>1</sup> Senate *Executive Journal*, I, 183.

<sup>2</sup> A resolution of similar import had been adopted, Feb. 28, 1793, in regard to the treaty which had been 'made between General Putnam, on behalf of the United States, and the Wabash and Illinois Indians.' *Ibid.*, I, 135.

<sup>3</sup> Hayden, *op. cit.*, 79.

<sup>4</sup> Senate *Executive Journal*, I, 185-86.

<sup>5</sup> *Ibid.*, 186.

This conditional consent to ratification put the President in a serious dilemma. Strong pressure was brought to bear upon him to withhold ratification. If the entire treaty would have to be resubmitted after ratification, as Republican Senators were asserting,<sup>1</sup> the outlook was discouraging, not only for this particular treaty but for future treaty-making, which might be hopelessly complicated by frequent resubmissions of treaties which then might still further be amended or rejected. Accordingly, Washington requested from each member of his Cabinet a written opinion upon these questions:

First, is or is not that resolution intended to be the final act of the Senate; or do they expect, that the new article which is proposed shall be submitted to them before the treaty takes effect?

Secondly, does or does not the Constitution permit the President to ratify the treaty, without submitting the new article, after it shall be agreed to by the British King, to the Senate for their further advice and consent?<sup>2</sup>

He also sought advice from Hamilton, who seems at first to have been of the opinion that resubmission was imperative.<sup>3</sup> Jefferson, meantime, was encouraging his followers in the Senate with the hope that 'a recurrence to the Senate' might be rendered necessary.<sup>4</sup> But the Cabinet members all agreed that it was unnecessary to submit the new article to the Senate, and Washington acted upon their advice, thus setting a precedent which has been followed consistently ever since, when the Senate's consent to a treaty has been qualified by a condition or amendment.<sup>5</sup> December 8, 1795, in his message at the opening of Congress the President said:

Agreeably . . . to the best judgment that I was able to form of the public interest, after full and mature deliberation, I have added my sanction. The result on the part of His Britannic Majesty is unknown.<sup>6</sup>

But the British Government without the slightest objection acquiesced in the treaty as amended. Ratifications were exchanged in London, and without further consultation with the Senate Washington pro-

<sup>1</sup> Crandall (*Treaties*, 81, n. 67) cites letter of Tazewell to Monroe, June 27, 1795, *Monroe Papers*, VIII, 951.

<sup>2</sup> Washington, *Writings*, XIII, 59-60.

<sup>3</sup> This is Hayden's inference from letters from Washington to Hamilton, July 3 and 13, 1795. Washington, *Writings*, XIII, 61-67.

<sup>4</sup> Jefferson to Tazewell, *Writings*, IX, 308.

<sup>5</sup> Hayden, *op. cit.*, 85.

<sup>6</sup> *Messages*, I, 183.

claimed the treaty. No protest was raised by the Senate or by individual Senators against the propriety of this action.<sup>1</sup>

The practice of qualifying its advice and consent to the ratification of treaties, thus begun during Washington's Presidency, has been continued to the present day. Doctor C. C. Tansill has shown that in the period from Jay's Treaty to 1901 not less than fifty-seven treaties or conventions, which had been amended by the Senate, were subsequently ratified by the thirty-three foreign governments with which they had been negotiated.<sup>2</sup> All of these states, thus, had occasion to take cognizance of this feature of our treaty-making system and recognize the warrant for the Senate's exercise of this power.<sup>3</sup>

No President has ever taken the ground that the Senate's right to amend treaties is not included in the power to reject or to ratify. Washington, though perplexed by the Senate's action, made no protest, and John Marshall, the greatest of Chief Justices, in his detailed discussion of the history of Jay's Treaty, made no suggestion that the Senate's action was unwarranted.<sup>4</sup> The Supreme Court of the United

<sup>1</sup> Hayden, *op. cit.*, 88.

Prompt modification of a treaty upon urgent request of Congress finds a precedent nearly a score of years earlier than the amendment of Jay's Treaty. Though the Treaty of Commerce (1778) with France was promptly and unanimously ratified by the Continental Congress, so many of its members felt that certain of its provisions were unfair in their concessions to France that the very day after ratifying the treaty they passed a resolution instructing the American commissioners in Paris to notify the French Government that it was the wish of Congress that two specified articles of that treaty be expunged. By counter-declarations those articles were soon rescinded. Francis Wharton, *The Revolutionary Diplomatic Correspondence of the United States*, II, 569.

<sup>2</sup> In his notable essay, 'The Treaty-Making Powers of the Senate' (*A Fighting Frigate*, 253–54), Senator Lodge gives a list of 68 treaties, amended by the Senate during the period from 1795 to 1900, which have been ratified by the governments of 34 foreign states. Critical examination of that list shows that it includes one treaty which never came before the Senate, at least three which were not amended at all, one which was rejected by the Senate, and many which failed of ratification, while it omits mention of at least ten treaties, or conventions, which belong in the list. The net result of these exclusions and additions brings the number to 57. See 'The Treaty-Making Powers of the Senate,' *American Journal of International Law* (July 1, 1924), 477–82.

<sup>3</sup> Our Allies in the World War had had opportunity to learn this feature by experience, for they had ratified Senate-amended treaties as follows: Great Britain, 5; France, 4; Italy, 1; Japan, 2.

<sup>4</sup> John Marshall, *Life of George Washington*, II, 360–69.

In 1801, President Adams regretted the Senate's conditional consent to the ratification of the convention with France, but explained — perhaps with more sarcasm than humility — that, in deference to the opinion of 'so high a constitutional authority as the Senate,' he judged it 'more consistent with the honor and interest of the United States to ratify it under the conditions prescribed than not at all.' Message of March 2, 1801.

The expediency of the Senate's amending treaties early came in question. Said John Quincy Adams, in Senate debate, Jan. 31, 1805: 'I think amendments to treaties imprudent. By making them you agree to all the treaty except the particular you amend' and at the same time you leave it optional with the other party to reject the whole....

States in a unanimous declaration has directly affirmed the right of the Senate to amend a treaty laid before them for their advice and consent. Mr. Justice Davis delivered the opinion of the Court, saying:

In this country a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the power to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration.<sup>1</sup>

Presidents have not merely recognized the Senate's power to amend a treaty: they have often sought to enlist its co-operation in perfecting a treaty by suggesting the adding of amendments which would remove ambiguities, eliminate inconsistencies with other treaties, safeguard some American interests which may have passed unnoticed before the treaty was signed, or even put pressure upon the other signatory for concessions which the negotiator for the United States had been unable to secure. Eleven Presidents, from Washington to Roosevelt,<sup>2</sup> have resorted to this expedient.<sup>3</sup> Usually the Senate has

When amendments are made by one party, they generally produce discontent and jealousy in the other contracting party. I believe there has not been an instance in which the U.S. have made a conditional ratification to a treaty but has proved injurious to us. Three instances now occur — Viz. the two last treaties with Great Britain — Mr. Jay's and Mr. King's, the last suspended by that nation, and the treaty with France.' (Plumer, *Memorandum*, 262.) Plumer himself said: 'We have been too much in the habit of attempting to amend — and to delay the ratification of treaties. The Convention with Spain was delayed so long before we ratified it, that Spain refused, and justly, to ratify the same. The last treaty with Great Britain we ratified with an amendment. That nation refused to accede to it. Both these treaties to our injury were lost. We shall in this way suffer in the estimation of other nations. We attempted to amend our last treaty with France — and we suffered by it.' (*Ibid.*, 482.)

<sup>1</sup> *Haver v. Yaker*, 9 Wall., 34–35, Dec., 1869. The case involved the question at what time a treaty, as it regarded private rights, became a law. The treaty in question, between the Swiss Confederation and the United States, had been 'concluded and signed' in 1850. The Senate amended it; ratifications were not exchanged and proclamation made till November, 1855. In *Fourteen Diamond Rings v. U.S.* (183 U.S. 183), Mr. Justice Brown said: 'The Senate may refuse its ratification or make it conditional upon the adoption of amendments to the treaty.' See also *New York Indians v. U.S.*, 170 U.S. 23.

<sup>2</sup> Lincoln once sent to the Senate, a treaty, the scope of which had already been broadened by amendment, and to the amended treaty it gave consent. (Senate *Executive Journal*, XIII, 122.) In some cases the amendments recommended by the President have been belated proposals from the other power. Feb. 27, 1890, the Senate gave unanimous consent to such amendments desired by Colombia, in a treaty which the Senate had already amended. *Ibid.*, XXVII, 42, 499.

<sup>3</sup> Washington set the precedent in such action. (*Ibid.*, I, 128.) Although Fillmore in several instances had suggested amendments, in his message of Feb. 13, 1851, he said: 'I have entertained considerable doubt whether it would not be better to send back the convention for correction in the objectionable particulars, before laying it before the Senate for ratification.'

found a solution for the problem upon which its advice was asked, or has made the amendments specifically suggested. In one case, when President Polk recommended that an article be stricken from a treaty and the Senate gave its belated consent to the treaty without making this amendment, the President sent a special message assigning the Senate's refusal to make the modification as one of his reasons for declining to ratify the treaty.<sup>1</sup> In 1870, President Grant recommended not less than four important changes in the pending treaty for the annexation of Santo Domingo.<sup>2</sup> Twenty years later, President Harrison recommended to the Senate the rejection of one article in the extradition treaty with the Independent State of the Congo.<sup>3</sup> In 1908, upon President Roosevelt's recommendation, the Senate qualified its consent to the ratification of the Hague Convention for the Settlement of International Disputes by an express reservation, framed by Secretary Hay, to indicate the purpose of the United States 'to refrain from entangling itself in the political questions . . . of any foreign state,' and to adhere to 'its traditional attitude toward purely American questions.'<sup>4</sup>

How will the Senate's amending a treaty be regarded by the President and by the other signatory power? While not infrequently a President has had cause to be grateful to the Senate for making amendments which have carried out his own requests or have corrected errors caused by the inadvertence of the American negotiators, in most cases the Senate amendments have not found the Executive in complaisant mood.<sup>5</sup> If in his opinion the treaty, as submitted to the Senate, represented the best that could be secured as a result of careful negotiation by those intimately acquainted with the whole complicated situation, the President resented any material alteration of the terms of the agreement, as damaging to his own prestige at home and abroad, and as likely to lead to the failure of the entire enterprise through the refusal of the other government to ratify a treaty whose terms were not identical with those of the one signed by its envoys. Presidents from Washington down have found themselves embarrassed in having to explain to the other power the check which has

<sup>1</sup> *Messages*, IV, 600.      <sup>2</sup> *Ibid.*, VII, 61.

<sup>3</sup> *Senate Executive Journal*, XXVII, 883.

<sup>4</sup> S. Doc. 444, 60th Cong., 1st sess., 61. For this whole topic, see Crandall *op. cit.*, 95-97.

<sup>5</sup> In imposing a condition upon the ratification of the treaty of 1798 with Tunis, it seems clear that the Senate prevented serious embarrassment, due to a conflict between its 14th article and our treaties with other countries. Hayden, *op. cit.*, 108-12.

come in proceedings. Secretary of State, Madison, October 15, 1804, wrote to Minister Yrujo of Spain thus:

The Senate, who, sharing in treaties on the final ratification only, and not till then even knowing the instructions pursued in them, cannot be bound by the negotiation like a sovereign, who holds the entire authority in his own hands.<sup>1</sup>... When peculiarities of this sort in the structure of a government are sufficiently known to other governments, they have no right to take exception at the inevitable effect of them.<sup>2</sup>

Vattel, a leading authority on international law a generation before our Constitution was framed, had insisted:

It is from the fundamental laws of each State that we must learn where resides the authority that is capable of contracting with validity in the name of the State.<sup>3</sup>

But ministers of foreign affairs have been slow to learn that lesson, or unwilling to admit their knowledge. Thus, in 1804, when Madison reluctantly sent to James Monroe instructions to secure the exchange of ratifications of the King-Hawkesbury Convention, which the Senate had amended by striking out the fifth article, lest it be construed in derogation of rights which the United States had just acquired by the purchase of Louisiana, the American Minister tells of a most uncomfortable interview with the new Secretary of State for Foreign Affairs, Lord Harrowby:

He censured in strong terms the practice into which we had fallen of ratifying treaties, with exceptions to parts of them, a practice which he termed new, unauthorized, and not to be sanctioned. I replied that this was not the first example of the kind; that he must recollect one had been given in a transaction between our respective nations in their treaty of 1794; that in that case the proposition for a modification was well received and agreed to.

But the Englishman persisted in 'implying strongly that we seemed desirous of getting rid of an article in finding that it did not suit us,' and instructions were sent to the British Minister at Washington:

His Majesty's Government can never acquiesce in the precedent which in this as well as in a former instance the American government has attempted to establish, of agreeing to ratify such parts of a con-

<sup>1</sup> The distinction is admirably presented in the credentials given to the American plenipotentiaries as contrasted with the full power of the Spanish commission, in the negotiation of the Treaty of Paris, 1898, C. H. Butler, *op. cit.*, II, 373.

<sup>2</sup> J. W. Davis, *op. cit.*

<sup>3</sup> *The Law of Nations*, bk. II, ch. XII, sec. 152 (Chitty, ed. 1834, 192).

vention as they may select and of rejecting other stipulations of it, formally agreed upon by ministers invested with full powers for that purpose.<sup>1</sup>

So this convention of 1803 became the first treaty to be rejected because of an amendment imposed on it by the United States Senate.<sup>2</sup> A century later another treaty with Great Britain failed for the same reason; another Secretary of State for Foreign Affairs professed the same indignant astonishment at the Senate's exercising its own judgment in amending a treaty. Lord Lansdowne, in his note to the British Ambassador at Washington, February 22, 1901, said:

The Clayton-Bulwer Treaty is an international contract of unquestioned validity; a contract which, according to well established international usage, ought not to be abrogated or modified save with the consent of both parties to the contract. His Majesty's Government find themselves confronted with a proposal communicated to them by the United States Government, without any previous attempt to ascertain their views, for the abrogation of the Clayton-Bulwer Treaty.<sup>3</sup>

In the Senate it had been argued that the pending Hay-Pauncefote Treaty of necessity entirely superseded the Clayton-Bulwer Treaty. To make assurance doubly sure, the words, 'which is hereby superseded,' were inserted as the Senate's first amendment. Had Mr. Hay proposed such supersession in his formal conferences with the British Ambassador, apparently no exception would have been taken to that mode of negotiation. Senator Lodge insisted:

A British Secretary of State for Foreign Affairs . . . ought to realize that the Senate can only present its views to a foreign government by formulating them in the shape of amendments which a foreign government may reject, or accept, or meet with counter-propositions, but of which it has no more right to complain than it has to the offer of any germane proposition at any other stage of the negotiation.<sup>4</sup>

A dozen years after Monroe as Minister to London had had the embarrassment of presenting that amended treaty to Lord Harrowby,

<sup>1</sup> Monroe to Madison, June 3 and Oct. 3, 1804, quoted by Hayden, *op. cit.*, 150-52, from *American State Papers, Foreign Relations*, III, 92-94; 98-99.

<sup>2</sup> In 1824, Secretary Clay explained to Mr. Addington: 'All that can rightly be demanded in treating is to know the contingencies on the happening of which that consent is to be regarded as sufficiently testified. This information the government of the United States has always communicated to the foreign powers with which it treats, and to none more fully than to the United Kingdom of Great Britain and Ireland.' J. B. Moore, *Digest of International Law*, V, 200-01.

<sup>3</sup> Quincy Wright, *The Control of American Foreign Relations*, 45.

<sup>4</sup> *A Fighting Frigate*, 224.

he had occasion as President to face a similar problem occasioned by the Senate's rejection, in 1816, of three articles in a treaty with Sweden and Norway, which had not only been signed by the Swedish plenipotentiary, but which had already been ratified by the Swedish King. After some anxious correspondence between President Monroe and the Secretary of State, instructions were framed directing our Minister to Stockholm to cause it to be distinctly understood by the Government of Sweden:

That it is a fundamental law of our system, that every treaty made by a minister of the United States, with whatever exact adherence to his powers and instructions and whatever the nature of its provisions, is still liable, when presented to the Senate for ratification, to be modified, or even to be totally rejected.

He was reminded of the experience with Jay's Treaty:

Of this precedent you will naturally make the fit use. Above all, you will give the explicit assurance, that the rejection of the articles must not be interpreted into the least absence of consideration or respect for the Government of Sweden.

This conciliatory approach met with a cordial response; the King gave order:

That the three articles which the Senate of the United States has believed ought not to be adopted, being of no particular interest for Sweden, and having been proposed only in the belief that they would be agreeable to the American Government, the King does not place any importance in maintaining them.<sup>1</sup>

So the King ratified the treaty anew in the form to which the Senate had given its advice and consent.

During the years from 1824 to 1900, Senate amendments proved fatal to not less than twenty-five treaties or conventions, ratifications not having been exchanged because of the other signatory powers' unwillingness to ratify the modified contracts or because of their non-acceptance by the President of the United States.<sup>2</sup> These

<sup>1</sup> Hayden, *op. cit.*, 208–15.

<sup>2</sup> Including changes by reservations as well as by amendments, D. F. Fleming states that the Senate had altered the terms of 146 out of a probable total of 900 treaties approved by it up to 1928. Of those 146 modified treaties, 48 were dropped by the President or rejected abroad. Of the 88 treaties approved conditionally from 1794 to 1901, 27, or 30 per cent, failed to be accepted; of the 58 treaties approved conditionally from 1901 to 1928, 21, or 38 per cent, failed. 'The alteration of treaties seems to be increasing both extensively and intensively. The Senate not only proposes more changes in treaties but kills a larger percentage in the process.' (*Op. cit.*, 36–37.)

diplomatic miscarriages have occurred most frequently in our dealings with Great Britain and with Mexico.

In recent years one of the most notable struggles between the Executive and the Senate developed over a series of general arbitration conventions negotiated by Secretary Hay. These came before the Senate in 1905 with the apparently ardent advocacy of President Roosevelt and Secretary Hay. They provided for the arbitration of 'differences of a legal nature' which do not affect 'the vital interests, the independence or the honor of the two contracting States and do not concern the interests of third parties.' In each individual case, before appealing to the Permanent Court of Arbitration, established under the Hague Convention of July 29, 1899, the high contracting parties were required to 'conclude a *special agreement* defining clearly the matter in dispute.' The amendment which the Senate imposed upon each of these treaties was the slightest possible in form:— it simply substituted the word 'treaty' for 'agreement' in the above phrase.<sup>1</sup> But its effect was momentous; it would require that a special treaty secure a two-thirds vote in the Senate before each individual case could be sent to the Court. President Roosevelt wrote to Senator Lodge:

I think that this amendment makes the treaties shams and my impression is that we had better abandon the whole business rather than give the impression of trickiness and insincerity which would be produced by solemnly promulgating a sham.<sup>2</sup>

He therefore decided not to submit these treaties to the other powers for ratification.

A few years later, 1908, the Senate consented to the ratification of no less than twenty-four arbitration treaties negotiated by Secretary Root, including one with Great Britain, in terms almost identical with those which had been signed by Secretary Hay, but with this added clause:

<sup>1</sup> 58th Cong., 3d sess., S. Doc. 155. *Views of the Minority in the Senate Committee on Foreign Relations*, Feb. 8, 1905.

<sup>2</sup> *Correspondence of Theodore Roosevelt and Henry Cabot Lodge*, II, 111. To the Chairman of the Committee on Foreign Relations he wrote that in his opinion the treaties so amended would represent a step not forward but backward, and intimated that if the Senate adopted the amendment, then pending, he should not attempt to secure an exchange of ratifications. (Shelby M. Cullom, *Fifty Years of Public Service*, 400.) For Secretary Hay's analysis of the causes of the Senate's action, and comments by others, see J. W. Garner, *American Foreign Policies*, 158, n. 40.

It is understood that such special agreements on the part of the United States will be made by the President by and with the advice and consent of the Senate.<sup>1</sup>

Much the same issue was involved when the Senate so amended the general arbitration treaties negotiated by Secretary Knox with England and France as to eliminate the decision by an international joint high commission of the question whether a specific dispute fell within the classes which must be arbitrated. President Taft, like President Roosevelt, refused to submit to the other signatories the treaties thus amended.<sup>2</sup> Professor Garner comments upon this handling of the treaties:

Again the Senate set upon them, truncated them, amended them, and qualified them in such a way that their own father could not recognize them. 'So,' says President Taft, 'I put them on the shelf and let the dust accumulate on them in the hope that the Senators might change their minds, or that the people might change the Senate — instead of which they changed me!'<sup>3</sup>

In both these controversies over the general arbitration treaties the Senate's opposition was professedly grounded on the argument that the treaties as signed involved an unconstitutional delegation of legislative power — in the Hague treaties to the President, and in the Knox treaties to an international commission. In each case the power delegated was in reality not a legislative power but rather the judicial power to interpret the treaty. The authority given the President by

<sup>1</sup> Malloy, *Treaties and Conventions*, 814. These treaties were for five-year periods, and most of them have been allowed to lapse. They proved of little practical value because no question could be submitted to arbitration without the consent of two-thirds of the Senators — which would rarely be given. They have made it even harder for the United States to have recourse to arbitration than it was in the early days when the Senate did not insist upon being consulted. J. W. Garner, *op. cit.*, 159; J. B. Moore, *International Law and Some Current Illusions*, 86.

Roosevelt's accepting responsibility for these Root treaties would of itself raise the presumption that he was not a sincere proponent of arbitration. In intimate correspondence he frankly wrote: 'I was lukewarm about those treaties. I only went into them because the feeling of the country demanded it.' (Letter to Sir Cecil Spring-Rice, quoted by W. Stull Holt, *Treaties Defeated by the Senate*, 212.) It is hard to avoid Dr. Holt's conclusion that in 1904 Roosevelt had not fought seriously for the arbitration treaties, and that he had then been less concerned to save the treaties than to 'discredit the Senate as an obstructive body.'

<sup>2</sup> These two general arbitration treaties, negotiated with England and France, had been intended to serve as the models for a series of similar treaties with a large number of countries.

<sup>3</sup> J. W. Garner, *op. cit.*, 160.

the Hague treaties seems well within the scope which has received the sanction of the Supreme Court:

Legislative power was exercised when Congress declared that the suspension (of certain provisions of the Tariff Act of 1890) should take place upon a named contingency. What the President was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.... What has been said is equally applicable to the objection that the third section of the Act invests the President with treaty-making power.<sup>1</sup>

The Senators' extreme point of view is set forth thus:

Fortunately, I am inclined to think, not only for the comprehension of the issues at stake, but for the country itself, a direct attempt was made to break once for all perhaps the most important of the powers of the Senate, in regard to one of the greatest if not the greatest of its Constitutional functions, its absolute veto upon any attempt of the Executive to make treaties without their consent.

Senator Lodge here refers to Secretary Hay's arbitration conventions, negotiated 'no doubt with the highest and best motives,' and continues:

The Senate was not of the opinion that this [treaty-making] power which was undoubtedly theirs ought to be taken away from them by a general treaty which in no respect affected the terms of arbitration to be agreed to in each particular case. The Senate, therefore, amended the word by which the subordinate treaties were described, changing it from 'agreement' to 'treaty,' which of course brought those instruments at once within the Constitution and made the advice and consent of the Senate necessary.<sup>2</sup>

In 1911, the Committee on Foreign Relations reported:

The Committee believes that it would be a violation of the Constitution of the United States to confer upon an outside commission powers which, under the Constitution, devolve upon the Senate.... To vest in an outside commission the power to say finally what the treaty means by its very general and indefinite language is to vest in that commission the power to make for us an entirely different treaty from that which we supposed ourselves to be making.<sup>3</sup>

<sup>1</sup> *Field v. Clark*, 143 U.S. 649 (1892). This topic is well presented by Quincy Wright, *op. cit.*, 110-15.

<sup>2</sup> H. C. Lodge, *The Senate of the United States*.

<sup>3</sup> 62d Cong., 1st sess., S. Doc. 98, 6.

On the other hand, in the view of the minority of that committee, as presented by Senators Root and Cullom, vesting power in the joint high commission to decide what questions are justiciable 'is not delegating to a commission a power to say what shall be arbitrated; it is merely empowering the commission to find whether the particular case is one that the United States have said shall be arbitrated.'<sup>1</sup> Chief Justice Taft, during whose Presidency the Knox arbitration treaties were negotiated, has stated his dissent from the Senate's decision thus:

There is no difference in principle between the consent of the Senate that an existing issue between us and a foreign nation should be settled by arbitration and an agreement that future questions of a defined class shall be so settled. . . . The question whether an issue is arbitrable within the classification of the treaty is a question of the construction of the treaty. Therefore, if the Senate were to consent to abide the judgment of a tribunal in the future as to whether an issue arising between us and a foreign nation is within a class of arbitrable questions described in a treaty, it is only consenting to arbitrate the construction of the treaty, when the event occurs which requires construction. This it has done in numerous treaties already.<sup>2</sup>

#### *Consent with Reservations*

The struggle in the Senate over the action to be taken upon the Treaty of Versailles focused attention upon the Senate's occasional practice of placing reservations upon its consent to the ratification of treaties, a practice for the most part confined to the years since 1900, and often selected as the best adapted in qualifying conventions to which many states are parties.

The Senate has at times used both the amendment and the reservation in ratifying the same treaty, for the purpose of safeguarding the interests of the United States. The distinctions between the two are not in the essential objects sought, but in the form taken by the qualified assent and in the notice or action called for from the other party to the agreement. As the contrast is ordinarily drawn, an amendment to a treaty is a textual change in the instrument itself by way of an addition, alteration, or excision; it makes a part of the identical contract to which the two governments are to give their

<sup>1</sup> S. B. Cullom, *Fifty Years of Public Service*, 397-98. T. E. Burton, speeches in Senate, 62d Cong., Feb. 6 and March 4, 1912, *Cong. Rec.*, XLVIII, 1750-55; 2950-52.

<sup>2</sup> William H. Taft, *Our Chief Magistrate* (1916), 105-08; J. B. Moore, *Principles of American Diplomacy*, 334-35; 62d Cong., 2d sess., S. Doc. 476, 9; 62d Cong., 1st sess., S. Doc. 98, 2-24; speech by Senator H. C. Lodge in Senate, Feb. 22, 1912.

assent in the exchange of ratifications.<sup>1</sup> A reservation, on the other hand, is an interpretation or construction placed upon some portion of the instrument by the Senate, to indicate the understanding with which the United States enters into the agreement as to the obligations which this country is to assume.<sup>2</sup> A leading authority on international law sets forth the effect of such a reservation thus:

When one of the parties to a treaty, at the time of its ratification, annexes a written declaration explaining ambiguous language in the instrument, or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it and the ratification duly exchanged, such distinct stipulation or explanation being duly approved by the constitutional authorities of each ratifying power, the declaration thus annexed is a part of the treaty, and as binding and obligatory as if it were inserted in the body of the instrument.<sup>3</sup>

That the Senate's reservation can have no effect unless the other party has had formal notice of it with opportunity for protest has been repeatedly asserted by the Supreme Court.<sup>4</sup> A similar opinion was expressed by the Court in regard to a resolution passed by the Senate, stating 'the intention of the United States' in ratifying the treaty of peace with Spain. It was held that the meaning of the treaty cannot be controlled by subsequent explanations of some of those who may

<sup>1</sup> Thus, the 'additional clause' imposed by the Senate upon the Jay Treaty declared: 'it is further agreed between the said contracting parties' that the stipulated portions of the twelfth article shall be suspended.

Amendments may not be formidable in appearance. March 31, 1871, the Senate unanimously agreed to the following amendments to the treaty with Guatemala: 'Article 2, paragraph 6, line 3, strike out the words *things being*, and, in the same line, substitute *or for on*.'

<sup>2</sup> One of the earliest and simplest illustrations of such an 'understanding' — and 'interpretative reservation' — is to be found in the treaty with Korea, 1882. (Malloy, *op. cit.*, 340.)

<sup>3</sup> J. B. Moore, *Digest of International Law*, V, 203. It is evident that the importance of the distinction here drawn between an amendment and a reservation tends to disappear as more and more formal and specific recognition of the 'understanding' is insisted upon in the exchange of ratifications.

<sup>4</sup> The treaty of June 15, 1838, with the New York Indians came before the Senate, which not only made certain amendments, but also made the ratification subject to an important proviso, which, however, was not mentioned in the official publication of the treaty nor in the President's proclamation, despite the fact that all the amendments except this proviso were published as a part of the treaty and it was certified that 'the treaty, as so amended, is word for word as follows' — omitting the proviso. The Court held: 'It is difficult to see how the proviso can be regarded as part of the treaty.' It seems never to have been called to the attention of the Indians. Said Mr. Justice Brown, in the opinion of the Court: 'There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian Tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it.' *New York Indians v. U.S.*, 170 U.S. 23.

have voted to ratify it, and that in this respect the resolution 'was absolutely without legal significance.' Mr. Justice Brown, in a concurring opinion, said:

It cannot be regarded as a part of the treaty, since it received neither the approval of the President nor the consent of the other contracting party.<sup>1</sup>

The right of the Senate to pass upon 'interpretations' or alleged 'understandings' set forth by our own negotiators or by the other party to a treaty with the United States has often been recognized by the President and jealously asserted by the Senate. Senate debate over the correspondence in regard to the Clayton-Bulwer Treaty showed resentment that the declaration, agreed to by the negotiators for the two countries, that British Honduras was not subject to the treaty's provisions, had not been submitted to the Senate, but had merely been shown to the Chairman of its Committee on Foreign Relations, whose statement that 'the Senate perfectly understood that the treaty did not include British Honduras,' had been accepted.<sup>2</sup>

The tacit assent of the Senate to an understanding has been held to be binding.

It was found upon examination of the original correspondence that the President of the United States was advised of the same understanding (between the negotiators of the treaty with Switzerland in 1850), and that the dispatch in which it was expressed was communicated to the Senate when the treaty was submitted for its approval. It was therefore declared by the United States that 'both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect.'<sup>3</sup>

Upon signing the arbitration convention with Great Britain, April 4, 1908, Ambassador Bryce addressed a note to Secretary Root giving his Government's understanding of certain provisions of the convention. To this the Secretary of State replied on the same day, concurring in these views. With the convention this correspondence was sent to the Senate for its information, but not as forming a part of the convention.<sup>4</sup> This procedure is in interesting contrast with that employed a month later, when the 'understanding' agreed upon in the

<sup>1</sup> *Fourteen Diamond Rings v. United States* (1901), 183 U.S. 176; J. B. Moore, *Digest of International Law*, V, 210.

<sup>2</sup> J. B. Moore, *Digest of International Law*, V, 203; 205-06; *Doe v. Braden*, 16 How. 635; Hayden, *op. cit.*, 124. For discussion of the value of commissioners' interpretation of Senate amendments, see Crandall, *op. cit.*, 85-86.

<sup>3</sup> Moore, *Digest of International Law*, V, 283-85.

<sup>4</sup> Crandall, *Treaties*, 89.

exchange of notes between the Minister of Portugal and Secretary Root was inserted in the Senate's resolution as one which 'will be mentioned in the ratifications of the treaty, and will, in effect, form part of the treaty.'<sup>1</sup>

In some instances the reservation has set forth only interpretations or qualifications which had been insisted on by the plenipotentiary of the United States at the conference.<sup>2</sup> In others the statement of the United States' understanding of certain specific clauses accompanied the 'reservation' and 'exclusion' of a definite article of the convention,<sup>3</sup> or was so phrased as to obviate the adding of certain desired amendments.<sup>4</sup>

In the score or more treaties upon which the Senate has imposed reservations it has reported its action to the President in varying formulas. Sometimes it was with a resolution 'that the President be requested to communicate the foregoing interpretation of said clause . . . on the exchange of ratifications of said treaty as the sense in which the United States understands the same'.<sup>5</sup> In recent years it has been customary to add to the resolution of ratification the following:

*Provided:* That the Senate advise and consent to the ratification of the said convention with the understanding, to be expressed as a part of the instrument of ratification, that . . .<sup>6</sup>

<sup>1</sup> The Portuguese envoy here took the initiative, to secure a desired understanding as to the enforcement of the death penalty, in connection with an extradition treaty. Malloy, *op. cit.*, 1475-76.

A similar assurance was given in connection with the treaty with Costa Rica, to which the Senate gave its consent, Jan. 26, 1923. *Ibid.*, 2554.

<sup>2</sup> Supplementary Industrial Convention, signed at Madrid, April 15, 1891. *Ibid.*, 1944. Convention for the Settlement of International Disputes (II Hague, 1907). *Ibid.*, 2247.

<sup>3</sup> *Ibid.*, 2366.

<sup>4</sup> Arbitration Treaty with Great Britain — vote in Senate, March 7, 1912.

For examples of reservations by other Governments, see *The Hague Conventions of 1899 (I) and 1907 (II) for the Pacific Settlement of International Disputes* (Carnegie Endowment edition), 42-48.

A peculiar complication arose in connection with the first treaty negotiated directly with Canada, signed, not by the British Ambassador, but by a commissioner for Canada. The Senate qualified its consent to ratification by an 'understanding': 'that none of the nationals . . . of any part of Great Britain shall engage in halibut fishing contrary to any provisions of the treaty.' The Canadian Government refused to accept this reservation, but its House of Commons proceeded to enact legislation, giving the assurance which Senator Jones (Wash.), the mover of the reservation, had desired. The treaty in its original form was then submitted to the Senate, and, after due consideration, its consent was given to ratification without any reservation. A. Lawrence Lowell and H. Duncan Hall, *The British Commonwealth of Nations*, 639-45; D. F. Fleming, *op. cit.*, 42.

<sup>5</sup> In the treaty with Korea, 1882. Malloy, *op. cit.*, 340.

<sup>6</sup> For example, in the treaty with Nicaragua, 1914. *Ibid.*, 2743.

Not content with even this degree of emphasis, in the case of a recent convention with Denmark the Senate in a further proviso insisted that

the attitude of the United States . . . as set forth in the above proviso, be made the subject of an exchange of notes between the Governments of the two high contracting parties, so as to make it plain that this condition is understood and accepted by the two Governments.<sup>1</sup>

That, in making these reservations upon treaties, the Senate has had no doubt, not only that it was acting within its constitutional competence, but also that it was expressing the attitude of the United States and not a mere partisan view, is indicated by the fact that while in four cases the record merely states 'two-thirds of the Senators present concurring therein,' in two instances the vote was much heavier, and on nine of them there was not a single dissenting vote.

In recent years it has been thought best to make assurance doubly sure by bringing the reservation into the protocol of exchange, signed by the plenipotentiaries of both powers, and insisting that mention of the other power's acceptance be made in the President's proclamation of the treaty. Thus, President Wilson, June 24, 1916, declared: 'The said understanding has been accepted by the Government of Nicaragua';<sup>2</sup> and, announcing, January 25, 1917, that 'this condition has been fulfilled by notes exchanged,' he proclaimed the treaty with Denmark, in order that it might be 'observed with good faith by the United States and the citizens thereof, subject to the said understanding of the Senate of the United States.'<sup>3</sup>

At the end of the World War it became a question of the utmost importance whether the apprehensions of enough Senators could be overcome by reservations so that the ratification of the Treaty of Versailles could be secured. In his statement opening the White House conference with the members of the Senate's Committee on Foreign Relations, President Wilson said:

There can be no reasonable objection to such interpretations (of the sense in which the United States accepts the engagements of the covenant) accompanying the act of ratification, provided they do not form a part of the formal ratification itself. . . . But if such interpretations should constitute a part of the formal resolution of gratification, long delays would be the inevitable consequence, inasmuch as all the many governments concerned would have to accept, in effect, the language

<sup>1</sup> Malloy, *op. cit.*, 2564.

<sup>2</sup> *Ibid.*, 2743.

<sup>3</sup> *Ibid.*, 2564.

of the Senate as the language of the treaty before ratification would be complete.<sup>1</sup>

Questioned as to whether the other nations could not accept a Senate understanding or construction 'merely by acquiescence,' he replied:

There would have to be either explicit acquiescence or the elapsing of a long enough time for us to know whether they were implicitly acquiescing or not.

The discussion led the chairman of the committee, Senator Lodge, to contrast the practice as to amendments and reservations thus:

I take it there is no question whatever on the international law and practice, that an amendment to the text of a treaty must be submitted to every signatory, and must receive either their assent or their dissent. I had supposed it had been the general diplomatic practice with regard to reservations — which apply only to the reserving power, and not to all signatories, of course — that silence was regarded as acceptance and acquiescence; that there was that distinction between a textual amendment, which changed the treaty for every signatory, and a reservation, which changed it only for the reserving power.

When the Treaty of Versailles was first brought to a vote before the Senate, it was upon a resolution requiring that the fourteen 'reservations and understandings' be made a part and condition of the ratification which was not to take effect until 'these reservations and understandings' should have been accepted as a part of the resolution

<sup>1</sup> Aug. 19, 1919, 66th Congl., 1st sess., S. Doc. 76. The stenographic report of this conference was published forthwith in the *Congressional Record*, 4013-31.

President Wilson further said: 'If the United States were to qualify the document in any way . . . our example would immediately be followed in many quarters, in some instances with very serious reservations, and the meaning and operative force of the treaty would presently be clouded from one end of its clauses to the other. . . . What I feel very earnestly is that it would be a mistake to embody that interpretation in the resolution of ratification, because then it would be necessary for other governments to act upon it.'

It soon became evident that the fate of the treaty would turn upon the burden of amendments or reservations which the Senate might load upon it. The distinction between them, therefore, aroused widespread discussion. Among the most significant opinions expressed while the question as to reservations was under discussion in the Senate were the following:

Charles E. Hughes, letter to Senator Frederick Hale, July 24, 1919.

Elihu Root, letter to Senator Henry Cabot Lodge, June 19, 1919.

William H. Taft, letter to *Philadelphia Public Ledger*, Nov. 10, 1919.

Senator Frank B. Kellogg, Aug. 7, 1919, *Cong. Rec.*, 3689; 3695.

Senator Frank B. Brandegee, *ibid.*, 3693.

Senator Porter J. McCumber, *ibid.*, 3694.

President Woodrow Wilson, Report of White House Conference, 12, Aug. 19, 1919.

Quincy Wright, 'Amendments and Reservations to the Treaty,' *Minnesota Law Review* (Dec. 1919), 17-18.

of ratification by at least three of the four principal allied and associated powers, their acceptance being authenticated by an exchange of notes.<sup>1</sup> Four months later, at the final test, the resolution to consent to the ratification required that fifteen reservations be accepted,

as a part and a condition of this resolution of ratification by the allied and associated powers, and a failure on the part of the allied and associated powers to make objection to said reservations and understandings prior to the deposit of ratification by the United States shall be taken as a full and final acceptance of such reservations and understandings by such powers.<sup>2</sup>

Discussion of the struggle over reservations relating to the United States' adherence to the 'World Court' has been deferred to a later section.<sup>3</sup>

#### *Consent Accompanied by Interpretative Resolution or Report<sup>4</sup>*

In connection with the ratification of the Multilateral Peace Treaty (the 'Kellogg Peace Pact') in January, 1929, a new device was brought into use which may serve in the future as a precedent of doubtful merit. In the past, American Senators had seemed to assume that they held a monopoly upon imposing 'reservations' upon treaties. But in the months preceding the convening of Congress in December, 1928, some Senators evinced not a little concern over European suggestions that the 'understandings' put upon the Pact in letters from English and French Foreign Ministers to the Secretary of State might be regarded as reservations upon the treaty itself, and seem to deprive it of genuine value. The Chairman of the Committee on Foreign Relations in an interview declared that the opinions expressed in such letters to the Secretary of State could not be regarded as reservations to the treaty itself, since they were not embodied in the instrument before it was signed at Paris, on August 27.

Early in the session, and several days before the treaty was reported back favorably from the committee, Moses and Reed (Mo.), who had been leaders in the 'Battalion of Death' against the League of Nations, jointly offered what they termed an 'interpretative resolution,' declaring that in advising and consenting to the ratification of the treaty the Senate did so with the understanding that the Pact did not

<sup>1</sup> Nov. 19, 1919, *Cong. Rec.*, LVIII, 8773.

<sup>2</sup> March 19, 1920, *ibid.*, LIX, 4599.

<sup>3</sup> Pages 706-13.

<sup>4</sup> This experiment with an 'interpretative report' as a substitute for reservations is well discussed at length by D. F. Fleming, *op. cit.*, 259-68.

(1) impose any obligation on the United States to resort to coercive or punitive measures against any offending nation; (2) impose any limitations upon the Monroe Doctrine or the traditional policies of the United States; (3) impair the right of the United States to defend its territory, possessions, trade or interests; nor (4) obligate the United States to the conditions of any treaty to which the United States was not a party.<sup>1</sup>

Chairman Borah expressed his disapproval of this resolution, and the President and the Secretary of State made it clear that they considered its introduction unfortunate. From day to day, reservations were proposed, and it was repeatedly urged that the Committee on Foreign Relations report its own understanding of the treaty's provisions. Chairman Borah declared such action neither necessary nor desirable, and the Secretary of State held out for unconditional ratification. Finally Bingham read, for insertion in the *Record*, the following statement, which he said had been signed by some twenty-five Senators and adhered to by others who did not care to sign it.<sup>2</sup>

We believe in the purposes and objectives of the Kellogg multilateral treaty. We believe that clarity of understanding regarding its inherent and declared functions is vital to its usefulness at home and abroad. To avoid reservations we believe the Foreign Relations Committee should report its official interpretation.

The next day, Chairman Borah announced that the Committee on Foreign Relations had unanimously agreed upon an interpretative report. Moses thereupon declared his desire to withdraw the resolution which he had introduced some weeks earlier. There ensued the following colloquy:

Mr. Harrison: What about the reservations that the Senator had filed? Are they withdrawn?

Mr. Moses: The resolution.

Mr. Harrison: The resolution embodying the reservations.

Mr. Moses: No; embodying the understandings. There are no reservations any more.<sup>3</sup>

A few moments later, Chairman Borah announced that he was filing the aforesaid report, and in the same breath called for the read-

<sup>1</sup> Dec. 14; the treaty was reported favorably Dec. 19. The vote in the committee was 14 to 2.

<sup>2</sup> Jan. 14, *Cong. Rec.*, 1666.

<sup>3</sup> Jan. 15. As reported in the press: 'Oh,' said Moses solemnly, 'they weren't reservations. *We don't have reservations in the Senate any more!*'

ing of the treaty, preparatory to the vote, the apparent intent being to minimize the formality of the presentation of the report. But the reading of the report was first insisted upon. It set forth the committee's 'understanding' in detail, and ended with the following statement:

This report is made solely for the purpose of putting upon record what your Committee understands to be the true interpretation of the treaty, and not in any sense for the purpose or with the design of modifying or changing the treaty in any way or effectuating a reservation or reservations to the same.<sup>1</sup>

No motion was made to adopt the report, nor to communicate it to the President or to representatives of the signatory powers. Consideration of the treaty was immediately resumed, and within a few minutes the Senate, by a vote of 85 to 1, gave its consent to unqualified ratification.<sup>2</sup>

It was greatly regretted by the Administration that, as a concession to the opponents of the treaty, this report had been filed. The Secretary of State was promptly quoted as declaring that the report was not a part of the treaty, and had no effect upon it, and that the report would not be transmitted to any of the signatories.<sup>3</sup>

#### *Delay or Failure of the Senate to Act*

Mere delay by the Senate may hold back the treaty till it ceases to be of moment. Annoying as the Senate's delay may be to the foreign power or to the American Executive, it is recognized that there is no just cause for complaint if the Senate, in exercising its treaty-making power, takes what time is needed to form its own judgment. Already in the First Congress the Senate was displaying a disposition to balk diplomatic activities to a degree that seemed to the President unaccountable. The consideration of the treaty with the Senates of the German Zollverein was postponed, March 15, 1845, for nine months by vote of the Senate.<sup>4</sup> For seven years, 1914 to 1921, the treaty with

<sup>1</sup> *Cong. Rec.*, 1730.

<sup>2</sup> *Ibid.*, 1731. D. F. Fleming, *op. cit.*, 259-68.

<sup>3</sup> For further discussion of this treaty, see the resolutions introduced by Capper (S. J. Res. 215, Feb. 27, 1929, *Cong. Rec.*, 4581-4604), and Korell (H. J. Res. 381, *Cong. Rec.* 1805; 3391; 3600), with the purpose of prohibiting the exportation of arms and munitions to countries violating the provisions of this treaty.

<sup>4</sup> Fillmore sent a special message, June 26, 1852, to the Senate, with a letter from Webster, Secretary of State, calling attention to the unfortunate effects of delay to act upon an extradition treaty with Mexico, which had been laid before the Senate nearly two years before.

Colombia for the settlement of differences connected with the secession of Panama was not brought to a vote in the Senate. The 'Treaty of Assistance,' negotiated with Great Britain and France, submitted to the Senate by President Wilson, July 29, 1919, has never emerged from the custody of the Committee on Foreign Relations. That unconscionable delay on the part of that committee or of the Senate itself is not necessarily an indication of serious opposition on the part of any considerable number of Senators is evident from the history of the Isle of Pines Treaty.<sup>1</sup>

<sup>1</sup> *Isle of Pines Treaty.* The 'Platt Amendment,' embodied in our treaty with Cuba, concluded May 22, 1903, provided that 'the Isle of Pines shall be omitted from the constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.' (Introduced by Senator O. H. Platt, as an amendment of the pending Army Appropriation Bill. It was accepted by the House and the bill was approved by the President, March 2, 1901. C. H. Butler, *op. cit.*, I, 176.) A treaty was promptly concluded (signed July 2, 1903) to accomplish that object, but it lapsed because the Senate failed to act upon it within the period limited by its terms. Accordingly, a new treaty was signed, March 2, 1904, relinquishing to Cuba all title to the Isle of Pines, 'in consideration of grants of coaling and naval stations in Cuba heretofore made to the United States by the Republic of Cuba.'

President Roosevelt transmitted this treaty to the Senate, March 3, 1904. After nearly two years, Feb. 1, 1906, it was favorably reported from the Committee on Foreign Relations. From that day till March 13, 1925, it was never brought to a vote in the Senate. During those twenty-one years since a treaty with this object was first laid before the Senate apparently there never was a moment when a President or a Secretary of State had a doubt that the Isle of Pines continued to be "part" of Cuba, and that it had never been territory of the United States. Secretaries Hay, Root, and Hughes emphatically asserted this attitude. But during that period of twenty-one years Americans were acquiring property on the island, and carrying on agitation against the ratification of the treaty.

Nov. 22, 1922, in a letter to the Chairman of the Committee on Foreign Relations, President Harding wrote, 'It is manifest that this Government has no intention ever to claim any title to the Isle of Pines,' and he urged that ratification of the treaty be consented to, in order that any possible cause of friction with Cuba or any uncertainty in the minds of the inhabitants of the island might be removed. Accordingly, Dec. 11, 1922, Lodge reported it favorably from the committee. Almost the last act of his public life was the securing of the passage of an order, June 3, 1924, by unanimous consent, that on Dec. 10, 1924, the Senate, in open executive session, should proceed to the consideration of this treaty. (Only three men then remained in the Senate who had been members of that body when this treaty was signed!)

Yet that consideration resulted only in further postponement, and its being put over to the special session of the Senate, beginning March 4, 1925. Then it encountered such a determined filibuster that the first step toward invoking cloture was taken. But after one man had harangued for eight hours in favor of further delay and investigation, at last a unanimous-consent agreement was reached, limiting each member to one speech of not more than fifteen minutes on the subject, and setting a definite hour on the following day for the final vote. By amendments to the resolution of ratification, two reservations were insisted upon, to make it clear that the so-called 'Platt Amendment' shall apply to the Isle of Pines as well as to Cuba, and that the 'most-favored-nation' treatment shall be applied to the people of the Isle of Pines. The roll-call upon ratification showed 63 yeas and 14 nays. Why it should have taken twenty-one years to secure the ratification of a treaty against which, after the cumulative agitation of all that period, the opposition could muster only fourteen votes remains one of the mysteries of Senate procedure.

Painstaking studies of Senate 'delays' in American treaty-making have been made by Professor Royden J. Dangerfield.<sup>1</sup> He has shown that in the aggregate treaty-making of nearly a century and a half (1788 to 1928), 77 per cent of the 'delay' had been incurred in periods between the signature and the submission of treaties, or between the Senate's giving its advice and consent to ratification and the actual exchange of ratifications, while only 23 per cent had been incurred during the periods when the treaties were in the 'custody of the Senate.' Moreover, he computed that in that century and a half nine treaties — each 'delayed' in the Senate more than one thousand days — account for 30.6 per cent of the total Senate 'delay'; that 50 per cent of all the treaties finally proclaimed have been approved by the Senate in less than twenty-eight days; and that the average has been one hundred and eight days, 'which does not seem high, if one compares that average with the time required by Congress to pass legislation.'<sup>2</sup>

The original grounds for opposition were best set forth in the speeches and reports of Senator Morgan in 1906 upon a resolution offered by him. See *Cong. Rec.*, XL, 4094–95; 7721–22; 7685–96; 8048–57.

R. J. Dangerfield (*op. cit.*, 135–42) throws new light upon the circumstances attending the delay and the ultimate ratification of this treaty, whose 'custody' in the Senate represents, as he phrases it, '11.5 per cent of Total Senate Delay.' He quotes from a personal letter from Senator Pepper, who finally led the successful drive for ratification: 'He [Senator Lodge] told me that very intensive opposition to ratification was being made by widely scattered but locally influential American citizens who had made speculative land purchases in the Isle of Pines in the hope that ultimately it would be declared to be American territory. He said further that the opposition was active and organized and there was nobody who had undertaken to champion the treaty against this opposition. He told me that the protestants lived chiefly in three states — New York, Pennsylvania, and Idaho. He said that Pennsylvania interests had secured the sympathetic support of Senator Penrose, who had no particular reason for desiring to have the treaty ratified and every reason to gratify a group of constituents.' Dangerfield quotes also from letters sent him, in reply to his inquiries, from Copeland and Borah. In 1924, Senator Borah, in conversation with the present writer, expressed the belief that ratification of the treaty would expose many American citizens, who had been establishing homes in the Isle of Pines in the belief (encouraged by certain official Government documents) that it was to remain under the rule of the United States, not only to serious financial loss, but also to loss of civic rights, if the Isle should revert to Cuban rule.

<sup>1</sup> *In Defense of the Senate* (1933), 89–147.

<sup>2</sup> In considering the significance of elaborate statistical computation, careful attention should be paid to the definitions and classifications adopted by their compiler. Dr. Dangerfield's table here deals only with treaties that actually came into force. But the Senate's habit of delay is to be seen perhaps even more clearly within the group of a hundred and more treaties which were never proclaimed. The compiler excludes a list of 51, to which, after long 'custody,' the Senate finally gave consent, having loaded them down with such amendments, reservations, or understandings that ratification was refused by the President or by the other party to the agreement. In a dozen of these, the Senate's 'delay' ranged from 114 to 780 days. So, also, the '53 treaties approved unconditionally by the Senate but never proclaimed,' and the 15 treaties

Delay of ratification in the part of a foreign power has been strongly condemned by the authorities of the United States. Secretary John Quincy Adams did not hesitate to denounce the Spanish King's delay of two years in exchanging ratifications of the treaty of 1819 for the cession of the Floridas.<sup>1</sup>

In many cases delay on the part of the Senate or of the other power has postponed actual exchange of ratifications or even the possibility of ratification itself beyond the time limits set by the treaty.<sup>2</sup>

actually 'rejected by the Senate,' included not a few treaties of major importance which had suffered long delay in the Senate. See W. Stull Holt, *op. cit.*, 142-43.

Under the Dangerfield classification, the treaty of Oct. 24, 1867, for the purchase of the Danish West Indies could appear neither in the list of 'Delayed Treaties' nor of 'Rejected Treaties,' nor could the record of procrastination in regard to that treaty enter into the computation of the Senate's 'average delay.' Yet this treaty was deliberately 'delayed to death' and its 'rejection' was as conclusive as if it had been accomplished by a direct adverse vote.

Referred to the Committee on Foreign Relations, Dec. 4, 1867, that committee's records show that on March 30, 1869, it was 'laid on the table, the understanding being that this was equivalent to rejection and was a gentler method of effecting it.' Not until nearly fourteen months later did the committee report it, adversely, to the Senate, which never discussed nor acted upon it. Danes have justly resented the Senate's shabby handling of this treaty 'which embodied every desire expressed by the American Government, and which had been ratified by the Danish Rigsdag and approved by the King.' (Charles C. Tansill, *The Purchase of the Danish West Indies* (1932), ch. II; S. F. Bemis, *A Diplomatic History of the United States*, 400; 402-04; 519; 521.) In this particular instance of treaty-making, there is little to be said '*In Defense of the Senate.*'

In the brief session of Congress, Dec. 7, 1868, to March 4, 1869, the Senate wrought its will on both this treaty with Denmark and on the far more important Johnson-Clarendon treaty with Great Britain relative to the *Alabama* Claims. Henry Adams's brilliant account of these transactions is to be found in 'The Session' (*North American Review*, CVIII, 628). In words which, as Dr. Holt says, 'contained a prophecy the fulfilment of which he was to experience many years later,' in 1884 Woodrow Wilson wrote: 'During the single congressional session of 1868-69 the treaty-marrying power of the Senate was exerted in a way that made the comparative weakness of the Executive very conspicuous, and was ominous of very serious results. It showed the Executive in the right, but feeble and irresolute; the Senate masterful, though in the wrong.' (*Congressional Government*, 50; W. Stull Holt, *op. cit.*, 107, n. 30.)

In the Dangerfield Table showing average periods of delay in the ratification of treaties, classified by 'Other Parties,' 21 states figure with but one treaty made with the United States; 15 with but two, and 12 with but three. In the course of 140 years, the average delays of these states in the Senate, of course, count for little. In several other tables classifying delayed treaties by Presidents, by Secretaries of State, etc., it is easy to give too much emphasis to averages based on very small numbers. Of great interest is the tabular presentation of delays classified by 'Types of Treaties' (p. 97). The summary of causes of delays is well grounded (pp. 142-43).

<sup>1</sup> Adams insisted that the King, in the full power given to his plenipotentiary, having bound himself to 'approve, ratify and fulfill... whatever may be stipulated and assigned by you,' was bound to ratify the treaty, both by the principles of the law of nations applicable to the case, and by the solemn promise in the full power, and declared that 'the United States have a perfect right... to compel the performance of the engagement as far as compulsion can accomplish it.' J. B. Moore, *Digest of International Law*, V, 189-90.

<sup>2</sup> There were five such cases in Jackson's Administrations.

When the time for exchange of ratifications has thus elapsed, the Senate at times has been called upon to consent to the exchange in spite of the fact; since 1840 the ordinary practice has been for the President to conclude an additional article for the extension of the time, and submit it to the Senate.<sup>1</sup>

*Rejection by the Senate* <sup>2</sup>

A bald refusal to consent to the ratification of the treaty is not the only method by which it may be killed by the Senate. 'Perfecting' amendments or reservations, it has been seen, may prove equally effective and give less of an affront to public sentiment at home if not abroad. When the Senate amended the Hay and the Root arbitration treaties, they had little reason to doubt that the President would abandon the treaties which would probably prove unacceptable. 'It would hardly tend toward international good will to offer a stone when the signatories have agreed to buy bread.'<sup>3</sup>

In the early days when the Senate consented to the full powers and instructions of negotiators and in some cases even promised in advance to ratify a treaty embodying specific provisions, the Senate acknowledged itself bound to give its approval to a treaty made in strict compliance with such conditions.<sup>4</sup> But in the later years, although as a body the Senate for the most part has had no share whatever in the preliminary negotiations, it has felt it to be fully within its constitutional rights, not only to amend the treaty or to advise its ratification with reservations, but also to reject the treaty outright.<sup>5</sup> That this attitude has entire justification has been asserted in most positive terms by the Executive. Said Secretary Fish: 'The Senate's advice and consent to be intelligent must be discriminating; their refusal can be subject to no complaint and can give no occasion for dissatisfaction or criticism.'<sup>6</sup>

<sup>1</sup> In several instances of belated exchange of ratifications, a proviso has been signed at the time of the exchange, declaring that the convention shall not be binding until the exchange has been sanctioned by the Senate.

<sup>2</sup> See D. F. Fleming, *The Treaty Veto of the American Senate*.

<sup>3</sup> Quincy Wright, 'Amendments and Reservations,' *Minnesota Law Review*, Dec., 1919.

<sup>4</sup> See Jay's opinion as to the duty of the Senate *Executive Journal*, I, 7; Diplomatic Correspondence, 1783-89, 304-22. See 66th Cong., 1st sess., S. Doc. 26, 83-380.

<sup>5</sup> 'Extracts from the *Executive Journal* of the Senate Relating to Proceedings in Cases of Treaties Rejected by the Senate,' June 2, 1919.

<sup>6</sup> 1869. Quoted by J. W. Davis, *The Treaty-Making Power in the United States*, 15.

'Of about 650 signed treaties the Senate has refused consent to ratification of about 20.'<sup>1</sup>

There is little justification from experience to expect that treaty-making will be handled as a non-partisan matter. Antagonisms in ordinary legislative business inevitably predispose many Senators to find serious defects in a treaty negotiated by men of the opposing party. Nationalistic or racial prejudices have their weight; a Senator's political future may be helped or harmed as his action on a treaty pleases or displeases the voters of his state in which large alien elements may have their views of America's foreign policy largely influenced by hereditary prejudices. Even personal dislikes between President and Senators may not be negligible factors.<sup>2</sup>

The controversy between President Johnson and Congress, ultimately leading to impeachment, could not fail to make difficult the

<sup>1</sup> Quincy Wright, *op. cit.*, 252. In the State Department's List of 1935 only 15 are thus classified.

#### TREATIES REJECTED BY THE SENATE AND RETURNED TO THE PRESIDENT\*

Signed	Country	Vote	Subject
1824	Colombia	0 : 40	Suppression of African Slave Trade
1835	Switzerland	14 : 23	Property Rights
1844	Texas	16 : 35	Annexation
1859	Nicaragua	31 : 20	Commerce
1860	Spain	26 : 17	Claims
1867	Hawaii	20 : 19	Reciprocity
1869	Gr. Britain	1 : 54	Adjustment of Outstanding Claims
1869	Domin. Repub.	28 : 28	Annexation
1874(?)	Gr. Britain		Reciprocity with Canada
1882	Mexico	32 : 26	Claims
1883	Multilateral	0 :	Industrial Property
1886	Gr. Britain	15 : 38	Extradition
1888	Gr. Britain	27 : 30	Fisheries
1897	Gr. Britain	43 : 26	General Arbitration
1919	Multilateral	49 : 35	Treaty of Versailles
1932	Canada	46 : 40	St. Lawrence Deep-Waterway

\* Tabulated from data in *List of Treaties Submitted to the Senate, 1789-1934*, issued by the Department of State.

<sup>2</sup> In *Treaties Defeated by the Senate* (1933), Professor W. Stull Holt has made an interesting 'study of the struggle between President and Senate over the conduct of foreign relations,' based not only upon records of debates and votes in Congress, but upon current newspapers, and personal letters and papers of men actually engaged in the controversies. In the main he finds that Senate defeat of treaties has been due to one or both of two causes. First, partisanship, inevitable in treaties involving political, economic, or sectional differences of belief or interest. Exceptionally liable to delay if not defeat have been treaties submitted during the many sessions of Congress when the party in opposition to the President was in control of the Senate, or during the months when a shift in party control of the Executive was in prospect. The Senate has given short shrift to treaties submitted by Presidents 'of no party,' like Tyler or Johnson. The second cause involved in the defeat of many treaties has been the Senate's determination to establish and maintain its 'prerogative' in the making of treaties, as in the control of appointments. This spirit has developed with increasing frequency and arrogance in the struggle over the Treaty of Versailles and the more recent multilateral agreements (p. 155).

ratification of treaties during his Administration. The cession of the Danish West Indies had come to seem imperatively necessary. Accordingly, a treaty was negotiated for their purchase for \$7,500,000; by plebiscite the people of the islands had overwhelmingly voted in favor of the transfer to American sovereignty; the Danish Rigsdag ratified the treaty and the King completed Denmark's ratification by his signature January 30, 1868. But Senator Sumner kept this treaty 'pigeon-holed for over two years' in the files of the Committee on Foreign Relations and, even when it was reported, the Senate did not allow it to come to a vote.<sup>1</sup> Hatred of the President, derision of the recent Alaskan purchase, popular unwillingness to follow Seward in his schemes for colonial dominion, the post-war lessened naval pressure are supposed to have been the causes leading to this discourteous treatment of a friendly power. Fifty years later the project was renewed, and in 1917, after the World War had emphasized the folly of leaving such naval facilities in the hands of another power, the purchase was effected at a cost of \$25,000,000.<sup>2</sup>

To that same period of bad feeling between President and Senate belongs the Johnson-Clarendon Convention with Great Britain, for the settlement of all outstanding claims of citizens of the two countries arising out of the then recent war. Senator Reverdy Johnson's nomination as Minister to England had been unanimously confirmed, but his conduct in London, particularly his showing pronounced social attentions to Laird, the builder of the *Alabama*, soon aroused resentment in this country. Sumner declared that the treaty which Johnson negotiated 'would have been ratified at any time last year almost unanimously.'<sup>3</sup> Opposition in the Senate soon became overwhelming and the treaty was rejected by vote of 54 to 1.<sup>4</sup> Yet hardly two years had passed when the Senate gave its consent to a

<sup>1</sup> W. F. Thompson, *America's Foreign Relations* (1916), II, 63.

<sup>2</sup> In contrast with the extraordinary delay and discourteous negligence accorded to the earlier treaty negotiated with Denmark, this one — submitted to the Senate Aug. 8, 1916 — was reported favorably from the Committee on Foreign Relations, Sept. 5, and the following day was debated and agreed to by 'a majority of about six to one.' Dr. Charles C. Tansill's *The Purchase of the Danish West Indies* (1932) presents effectively the entire narrative of our dealings with Denmark in regard to that purchase.

<sup>3</sup> Letter to John Bright, Jan. 17, 1869.

<sup>4</sup> 'Some declared that Johnson had truckled to the British aristocracy and ought to have snubbed them, instead of making friendly speeches. Some thought the treaties must be wrong, because the British had agreed to them. Others wanted no treaty, but rather a standing grievance, as a basis for a future war with England, and still others considered that "the fact that they were made by President Johnson's Secretary of State and Minister was reason enough for refusing to accept them.'" B. C. Steiner, *Life of Reverdy Johnson*, 249; Senate *Executive Journal*, XVII, 163.

treaty negotiated under a new administration under which the Alabama claims were successfully arbitrated.

Personal antagonism between President Grant and Secretary Fish, on the one side, and Sumner, the dominating Chairman of the Committee on Foreign Relations, on the other, played its part in the fortunate rejection of the treaty for the annexation of Santo Domingo upon which the President had set his heart.

In 1897 a treaty which represented forward-looking statesmanship was rejected by the Senate. Warned by the strained relations which had developed with Great Britain over the Venezuelan boundary question and by other causes of friction between the two countries, President Cleveland caused a treaty to be negotiated providing for the arbitration of disagreements relating to pecuniary and territorial claims, and submitted it to the Republican Senate, January 11, 1897, declaring:

The example set and the lesson furnished by the successful operation of this treaty are sure to be felt and taken to heart sooner or later by the other nations and will mark the beginning of a new epoch in civilization.<sup>1</sup>

Two months later he was succeeded by President McKinley, who in his inaugural address urged 'the early action of the Senate thereon, not merely as a matter of policy, but as a duty to mankind,'<sup>2</sup> yet, after the Senate had amended the treaty, so many of that body still professed to find in it 'a surrender of American Sovereignty' that it failed in ratification by a vote of 43 yeas to 26 nays.

Not even the adoption of a dozen and more reservations could reconcile the Senate to ratifying the Treaty of Versailles, although a study of the various votes taken during the struggle indicates that a substantial majority of the members of the Senate favored ratification in some form.<sup>3</sup>

In quite a number of cases, after giving or refusing its assent to the ratification of the treaty, the Senate has changed its mind, requested that the President return its resolution and then reconsidered and reversed its previous action. Thus, after rejecting a treaty with Nicaragua in 1860, within four days the Senate requested the return of its resolution. The President complied, and, after reconsidering

<sup>1</sup> *Messages*, IX, 746-47.

<sup>2</sup> *Cong. Rec.*, XXX, 4; J. B. Moore, *Digest of International Law*, VII, 75 ff.; D. F. Fleming, *op. cit.*, 77-84.

<sup>3</sup> The votes are effectively analyzed by W. Stull Holt, *op. cit.*, 294-99.

its vote, the Senate amended the treaty and consented to its ratification.<sup>1</sup> On the other hand, in 1874 the Senate by unanimous vote gave its advice and consent to an extradition treaty with Belgium, but then they later requested the President to return its resolution of consent. The President had already ratified the treaty, although the exchange of ratifications had not taken place. So the Senate rescinded its request and the treaty became effective.<sup>2</sup>

#### JOINT RESOLUTIONS SUBSTITUTED FOR TREATIES

In two notable instances the actual or probable rejection of the treaty through the failure to secure the constitutional two-thirds majority in the Senate led its advocates to resort to a joint resolution to accomplish the purpose which had been sought by the proposed treaty. As early as 1836 this option had been suggested from outside. In instructions to Memucan Hunt, a Texan envoy to the United States, it was stated thus:

In the event that there should be doubts entertained whether a treaty made with this government for its annexation to the United States would be ratified by a constitutional majority in the Senate of the United States, you are instructed to call the attention of the authorities of that government to the propriety and practicability of passing a law by both houses (in which it would require a bare majority) taking in this country as a part of her Territory.<sup>3</sup>

In 1837 and 1838 annexation was debated in Congress. April 22, 1844, President Tyler sent a message to the Senate strongly urging its consent to the ratification of the treaty of annexation just concluded.<sup>4</sup> Benton led the fight against the treaty, insisting that its ratification would be the adoption of the Texan war with Mexico, that the treaty-making power did not extend to the power of making war, and that the President and the Senate had no right to make war either by declaration or by adoption.<sup>5</sup> Walker made vigorous reply. Foreseeing the likelihood of the treaty's defeat, McDuffie had introduced in the Senate a joint resolution providing for annexation on the terms which had been stipulated in the treaty. Two days after

<sup>1</sup> Senate *Executive Journal*, II, 163; 166; 218.

<sup>2</sup> *Ibid.*, XIX, 281; 289; 291.

<sup>3</sup> 'Texas Diplomatic Correspondence,' *Annual Report, American Historical Association*, 1907, II, 164.

<sup>4</sup> *Messages*, IV, 307-09.

<sup>5</sup> *Cong. Globe*, XIII, Appendix, 474; 552.

the treaty's rejection by a vote of 35 noes to 16 ayes, President Tyler took the unprecedented step of sending the rejected treaty to the House of Representatives.<sup>1</sup> In the fight for annexation by joint resolution the time-worn constitutional arguments were renewed in both branches. But 'the people . . . demanded immediate annexation by a law that would speak the will of the majority in Congress.'<sup>2</sup> The House passed the resolution by a vote of 120 to 98.<sup>3</sup> The Senate Committee on Foreign Relations, reluctant to concede treaty-making power to the House, reported this resolution adversely, but after 'saving its face' by adding an amendment to the resolution so as to leave it to the President's discretion whether to submit this resolution as an offer to Texas or to negotiate further for annexation, the Senate finally passed the resolution by a vote of 27 to 25.<sup>4</sup> The House gave its approval to the amended resolution by a more decisive vote than before, and the President at once sent to the Texas Government notice of this action. The people of Texas voted overwhelmingly in favor of annexation. Three months later the joint resolution for the admission of Texas to be a member of the Union on equal footing with the original states passed the House by a vote of 166 to 141, and the Senate, a week later, by a vote of 31 to 14, and was promptly approved by the President.

In 1893 an annexation treaty which had been concluded with the Provisional Government in Hawaii was still awaiting ratification in the Senate when President Cleveland was inaugurated. He at once withdrew it from the Senate's consideration. Hardly had President McKinley succeeded to the Presidency when another treaty was negotiated. Though promptly ratified by the Hawaiian legislature, its ratification in the Senate was delayed by strong opposition. The outbreak of the war with Spain and the Battle of Manila Bay had so strengthened the feeling that a mid-Pacific naval station was imperatively needed, that 'the cession of Hawaii was accepted and

<sup>1</sup> Senate *Executive Journal*, VI, 311-12. Tyler wrote: 'While the treaty was pending before the Senate, I did not consider it compatible with the just rights of that body or consistent with the respect entertained for it to bring this important matter before you. The power of Congress is, however, fully competent in some other form of proceeding to accomplish everything that a formal ratification of the treaty could have accomplished.' (*Messages*, IV, 323-24.) On Texan annexation, see B. F. Bemis, *op. cit.*, 225-30.

<sup>2</sup> C. K. Davis, in report from Committee on Foreign Relations, March 16, 1898, on joint resolution for annexation of Hawaii, 55th Cong., 2d sess., S. R. 681.

<sup>3</sup> Jan. 25, 1845, *Cong. Globe*, 359.

<sup>4</sup> Benton, *op. cit.*, II, 636; Crandall, *Treaties*, 135-36. Grant reminded Congress of this precedent, as applicable to Santo Domingo. *Messages*, VII, 100.

confirmed on the part of the United States by a joint resolution approved July 7, 1898.<sup>1</sup> Though the Senate's approval was given by

<sup>1</sup> Crandall, *Treaties*, 138; S. F. Bemis, *op. cit.*, 460-62.

Annexation had been strongly urged in the report of the Committee on Foreign Relations, which laid great stress on the Texan precedent. (55th Cong., 2d sess., S. Rep. 681.) 'The majority in both houses of Congress chose to ignore those constitutional objections,' is the comment of W. W. Willoughby, in *The Constitutional Law of the United States*, I, 344-49. Senate debate, especially in *Cong. Rec.*, 55th Cong., 2d sess., 6335.

In 1899, learning that the Danish Government would consider with favor a proposal by the United States to purchase the Virgin Islands, Secretary Hay thought that he might elude the two-thirds vote in the Senate by having the purchase accomplished by a joint resolution instead of by a treaty, for he felt sure of a majority in both houses. So he went to Senator Cushman K. Davis, Chairman of the Committee on Foreign Relations. 'I . . . put the case before him and asked him squarely which procedure offered the best chance of success. I could see he feels as I did — that the joint resolution was preferable. But being a Senator, he could not at once bring his mind to pass over the Senate, so he asked me for a few days to make up his mind. I am afraid he will decide for the Senate.' (Allan Nevins, *Henry White*, 147-48.) Apparently no such joint resolution was introduced.

#### RECIPROCITY BY TREATY OR BY LEGISLATION

It is sometimes possible to secure by the negotiation of a treaty an object which long-continued efforts have failed to attain by legislation. One of the best illustrations of this is found in the history of the Canadian Reciprocity Treaty of 1854. In three successive Congresses the Senate defeated reciprocity bills. Representatives of the British Government suggested that a treaty be negotiated to accomplish the desired object, but President Fillmore and more than one Secretary of State held that it was much preferable to regulate the matter by reciprocal legislation. The spirit of retaliation was growing in Canada, and presently a clash over fishing rights seemed inevitable. President Pierce and Secretary of State Marcy were willing to try negotiation. In the efforts to make friends for the project unusual methods were employed on both sides. A special agent, with thousands of dollars to his credit, was sent to the Lower Provinces to promote a friendly attitude toward such a convention. His expense account shows many suggestive entries — for example, a payment of \$840 to a single member of a provincial legislature of large influence. Meantime, Lord Elgin and his suite had arrived in Washington, and, despite the fact that Congress was in the throes of excitement attending the passing of the Kansas-Nebraska Bill, after ten days of lavish hospitalities given and received, he was able to assure the astonished Secretary of State that, if the President was now prepared to adhere to the promise to conclude a reciprocity treaty, a majority in the Senate would be found in its favor. (As to the charge that 'the treaty had been floated through on champagne,' Lord Elgin's secretary later wrote: 'Without altogether admitting this, there can be no doubt that, in the hands of a skillful diplomatist, that beverage is not without its value.') The treaty was approved by the Senate, Aug. 2, 1854, by a vote of 32 to 11; three days later the Act to carry it into effect was approved; and the provincial legislatures promptly passed laws giving its provisions full effect. Charles C. Tansill, 'The Canadian Reciprocity Treaty of 1854' (1922), in *J. H. U. Studies*, Series 40, no. 2, 66-74; W. Stull Holt, *op. cit.*, 86.

In the second session of the 73d Congress a Reciprocal Tariff Bill, sponsored by the Administration, was approved by the House, March 29, 1934, by a vote of 274 to 111. It delegated to the President authority to negotiate reciprocal tariff agreements which would not require the Senate's consent to ratification. A House amendment limited to three years the power thus delegated to the President. After only two and a half weeks' consideration, with minor amendments sponsored by its Finance Committee, the Senate approved the bill, by a vote of 57 to 33. But serious opposition was evident in the support given to amendments that were voted down: to prohibit all reductions in agricultural tariffs; to prohibit reductions in agricultural tariffs below the amounts

a two-thirds vote, it is to be observed that the Senate was here exercising its legislative, not its treaty-making, power.

#### THE PRESIDENT'S DISCRETION AS TO A SIGNED TREATY

##### *He May Withhold the Treaty from the Senate*

Just as Congress was about to adjourn, March 3, 1807, there was received a treaty which Monroe and Pinkney had negotiated with Great Britain. President Jefferson 'expressed the greatest astonishment and disappointment' upon learning of its contents, particularly its failure to make any determination on the point of the impressment of seamen, claimed as British, out of American ships. When a joint committee waited upon him, to announce that Congress was ready to adjourn, and a Senator ventured to ask him whether there would be a call of the Senate in special session to consider the treaty, the President replied, 'Certainly not!' before he had even had a chance to study the treaty, so incensed was he over its failure to conform to the envoys' instructions. The Senators were extremely curious as to the contents of the treaty, and 'they were not pleased to learn that the President meant to tell them nothing and cared too little for their opinion to ask it.' In the words of Senator Samuel Smith:

The Senate . . . did unanimously advise the President to negotiate the treaty with Great Britain. The Senate agreed to his nomination of the negotiators. A treaty was effected. It arrives. It is well known that he was coerced by the Senate to the measure; and he refuses to submit it to their approbation. What a responsibility he takes!

The historian of that epoch concluded:

No act of Jefferson's administration exposed him to more misinterpretation, or more stimulated a belief in his hatred of England and of commerce, than his refusal to lay Monroe's treaty before the Senate.<sup>1</sup>

Crandall cites not less than a dozen instances of Presidents' assuming this responsibility of withholding from the Senate a treaty

necessary to equalize costs of production; to require congressional approval of trade agreements; to require public hearings on proposed tariff changes. Under this law, prior to Jan. 1, 1938, reciprocity agreements were entered into with 16 countries, under constant criticism from Senators whose states' interests were adversely affected. Others protested against all such agreements as an encroachment upon the 'treaty-making power' assigned to the Senate by the Constitution. For discussion of the contrasts between the reciprocity policy of McKinleyism and this new reciprocity policy sponsored by Secretary of State Hull, see S. F. Bemis, *A Diplomatic History of the United States*, 748-51.

<sup>1</sup> Henry Adams, *History of the United States*, III, 429-40.

already signed by negotiators on the part of the United States and of another power.<sup>1</sup>

#### *He May Withdraw the Treaty from the Senate*

There is no question that the President may withdraw a treaty, which the Senate already has under consideration, even if it had been submitted by his predecessor. Within ten days after his first inauguration, President Cleveland withdrew 'for purposes of re-examination' three treaties which President Arthur had submitted to the Senate with urgent advocacy insisting that they would 'respond to the national policy of intercourse with neighboring communities of the American system.'<sup>2</sup> This policy did not commend itself to the new President and these treaties were never returned to the Senate. Again, when Cleveland became President in 1893, there had just been laid before the Senate a treaty of annexation concluded with the Provisional Government of Hawaii, set up by the revolution of January 14, 1893. Impressed with the charges that unjustifiable American influence and force had brought about the revolution which dethroned the Queen and that the new government had been recognized with indecent haste, as a preliminary to investigation by a special envoy the President at once withdrew the treaty 'for the purpose of re-examination,' and the annexation project was balked.<sup>3</sup>

Aside from withdrawals of treaties because of doubt as to their merit or policy, they have at times been withdrawn merely to perfect their phraseology.<sup>4</sup>

#### *He May Refuse to Ratify after the Senate Has Given its Consent*

What is the situation if the Senate by a two-thirds vote has consented to the ratification of the treaty in the exact form in which the President submitted it to the Senate? 'That would conclude the transaction,' declared Senator Brandegee.<sup>5</sup> Other Senators have been more emphatic.

<sup>1</sup> *Treaties*, 95.

<sup>2</sup> *Messages*, VIII, 303; 256.

<sup>3</sup> *Ibid.*, IX, 393.

<sup>4</sup> President Wilson withdrew a treaty, Jan. 17, 1920, on the report of the Secretary of State that objections which had been raised to one of its articles might be met by redrafting that article without prejudicing the treaty as a whole. *Cong. Record*, LIX, 1645.

Even after a treaty seems to have been conclusively defeated, in the Senate, it may be withdrawn. Jan. 18, 1927, the resolution of advice and consent on the Treaty of Lausanne (with Turkey, submitted May 3, 1924) failed, yeas 50, nays 34. It was not then returned to the President. Seven years later it was withdrawn by President Roosevelt. (*Ibid.*, 628, Jan. 15, 1934.)

<sup>5</sup> Senate debate, March 2, 1920, *ibid.*, LIX, 1645.

When this body by a two-thirds vote has ratified, advised, and consented to that treaty, the point of finality has been reached. Life has been breathed into the treaty by the action of the Senate. The manual delivery of the document has nothing whatever to do with its validity.... I do not hold to the doctrine that after this last act that the Government of the United States has to do with the treaty has been performed by the Senate, any man can nullify the action of the Senate by withholding the delivery of the document.<sup>1</sup>

But neither the theory of the Constitution nor practice under it accords with this view of limitation upon the President's discretion when a treaty is sent back to the White House with the Senate's resolution of consent. Says former Ambassador John W. Davis:

Here there returns to the President all the freedom which he originally enjoyed. He could have declined in the first place to negotiate; he could have elected not to lay the negotiated treaty before the Senate; he could at any time before the final vote have withdrawn it from their further consideration; and now he may decide to proceed no further upon the advice and consent which the Senate express. This is true as well when the action of the Senate is one of unanimous approval, as when it is one of grudging consent or mutilating amendment. In either case he may lock the treaty in his desk or consign it to cold oblivion in the public archives.

The roster of such diplomatic casualties is by no means short. It displays the constant jealousy with which the Executive and the Senate have guarded their respective powers. There was a tremendous mortality, for instance, when the Senate and President Roosevelt locked horns over the arbitration treaties negotiated by Secretary Hay with a number of nations.<sup>2</sup>

It should be observed that the phrases, 'the Senate's ratification' and 'the Senate's resolution of ratification,' while in almost universal use, are inaccurate and convey a wrong impression. The Senate does not ratify — it gives or it withholds advice and consent to the ratification of a treaty. But the power of ratification belongs to the President alone, and the Senate's advice and consent, while they may be illuminating to him, are in no sense mandatory. In the words of Senator Spooner:

Out of public necessity the President should be permitted to pocket a treaty, no matter if every member of the Senate thought he ought to

<sup>1</sup> *Cong. Record*, LIX, 3744. J. A. Reed.

<sup>2</sup> *The Treaty-Making Power in the United States*, 15.

Senator Spooner's thesis was: 'So far as the conduct of our foreign relations is concerned, excluding only the Senate's participation in the making of treaties, the President has the absolute and uncontrolled and uncontrollable authority.' Speech in Senate, Feb. 6, 1906, quoted by E. S. Corwin, in *The President's Control of Foreign Relations*, 172. Crandall, *Treaties*, 97-99.

exchange the ratification. Why? Because the President, through the ministers, ambassadors, consuls and all of the agencies of the Government, explores sources of information everywhere; it is his business to know whether anything has occurred since the Senate acted upon the treaty which would render it for the public interest that ratifications be not exchanged. And he is empowered to withhold exchange of ratifications, if upon later knowledge he deems it for the public interest so to do.<sup>1</sup>

## THE SENATE AND EXECUTIVE AGREEMENTS<sup>2</sup>

I submit it to the consideration of the Senate whether this is such an arrangement as the Executive is competent to enter by the powers

<sup>1</sup> E. S. Corwin, *op. cit.*, 175.

Senator Lodge declared: 'No one, I think, can doubt the absolute power of the President to initiate and carry on all negotiations; and, after a treaty has been returned to him with the ratification of the Senate, to withhold it from ratification, if he sees fit.' (Note the confusion in the use of 'ratification' in this one sentence.) Jan. 24, 1906, *Cong. Rec.*, 1470.

Crandall, *op. cit.*, 97–99, mentions the following cases of refusal or failure to exchange ratifications:

Signed	Country	President	Message	Subject
1845	Prussia	Polk	July 28, 1848	Extradition
1856	Venezuela	Buchanan	Jan. 2, 1901	{ Amity Commerce
1905	International	Roosevelt	June 6, 1908	Extradition White Slave Traffic

Here may be cited, also, the ten treaties of arbitration negotiated, 1904–05, by Secretary Hay, and the two, 1911, negotiated by Secretary Knox, which the Senate amended in such wise that Presidents Roosevelt and Taft chose not to attempt any exchange of ratifications (pp. 614–17).

<sup>2</sup> The great variety and importance of the executive agreements of recent years are making them a tempting and fruitful field for research. In a study of the present scope, they call for consideration only as they involve questions of encroachment upon the constitutional powers of the Senate, particularly as to treaty-making. Important aspects of the subject are treated by these men:

H. M. Wriston, *Executive Agents in American Foreign Relations* (1929). The most important controversies between the Executive and the Senate over executive agreements are discussed in detail in this treatise embodying exhaustive research. J. T. Barnett, 'International Agreements without Advice and Consent of the Senate,' *Yale Law Journal*, Nov., 1905, XV, 18–27.

E. S. Corwin, *The President's Control of Foreign Relations* (1917). S. B. Crandall, *Treaties, Their Making and Enforcement* (1916), 102–33. C. C. Hyde, 'Agreements of the United States Other Than Treaties,' *The Green Bag*, April, 1905, XVII, 229–38.

J. M. Mathews, *The Conduct of American Foreign Relations* (1922). *American Foreign Relations — Conduct and Policies* (1928).

vested in it by the Constitution, or is it such an one as requires the advice and consent of the Senate?<sup>1</sup>

That question of executive competence, propounded to the Senate by President Monroe in 1818, is one which every President has had many times to face and to answer for himself. For 'all treaties are agreements, but all international agreements and understandings are not "treaties."'<sup>2</sup>

In the first place, from the days when the Senate contained many members who had helped frame the Constitution, it is clear that decisions of the highest moment as to this country's relations with foreign powers have been left to the discretion of the President under clear authorization of Acts of Congress or of treaties. In recent years the most familiar illustrations of this agreement-making under authorization of law have been in relation to the tariff. Under the Tariff Act of October 1, 1890, ten 'reciprocity agreements' were made through the Secretary of State's exchanging diplomatic notes and the President's proclamation. Challenged as an unwarranted delegation of power, this law's provision was sustained by the Supreme Court as not in any real sense delegating to the President either legislative or treaty-making powers.

What the President was required to do was simply in execution of the Act of Congress, . . . [It devolved upon him to see that the law was faithfully executed] — a law whose operation was contingent upon the existence of certain facts — reciprocal legislation or practice in the foreign state. . . . He had to determine whether rates offered by foreign countries were reciprocally reasonable or equivalent — just the sort of investigation often devolved upon the negotiator of the treaty.<sup>3</sup>

Under the Dingley Act of 1897 the President concluded and proclaimed reciprocity agreements with France, Germany, Italy, and Portugal. Under similar authorization by Congress through the Postmaster-General the President has negotiated and concluded postal treaties or conventions; and executive agreements have also been made as to patents, copyright, and trade marks.<sup>4</sup>

J. B. Moore, *Digest of International Law*, 1906, V, 210–21.

'Treaties and Executive Agreements,' *Political Science Quarterly*, Sept., 1905, XX, 385.

Henry M. Wriston, 'Presidential Special Agents in Diplomacy,' *American Political Science Review*, Aug., 1916, X, 481–99.

Quincy Wright, *The Control of American Foreign Relations* (1922).

<sup>1</sup> Message from President Monroe to the Senate, April 6, 1818. *Messages*, II, 36.

<sup>2</sup> J. C. Spooner, Jan. 23, 1906, *Cong. Rec.*, XL, 1418.

<sup>3</sup> Field *v.* Clark, 143 U.S. 649. <sup>4</sup> Quincy Wright, *op. cit.*, 105, n. 52.

In carrying into effect the provisions of treaties the President has often entered into administrative agreements with foreign powers as to the authoritative delimitation and mapping of boundaries. Every rendition of a criminal under an extradition treaty calls for an individual agreement with a foreign power, 'and the final act of surrender still rests within the discretion of the President.'<sup>1</sup> The Hay general arbitration treaties were concluded upon the assumption that under the first Hague Convention (1899) the President would have power to conclude *compromis* for submitting cases to the Hague Court for arbitration, but the Senate blocked what it regarded as encroachment upon its treaty-making power; and in 1911 it amended new arbitration treaties so that the submission of each individual case must be by the Senate's advice and consent.<sup>2</sup>

As 'Commander-in-Chief of the Army and Navy of the United States,' the President has had occasion to enter into many agreements with foreign governments which were not treaties, yet which lay within the twilight zone which borders the treaty-making power. In 1817, the Rush-Bagot Agreement was concluded for the limitation of naval forces upon the Great Lakes, and not till nearly a year later — apparently because of repeated inquiries by the British Minister — was it submitted to the Senate, with the query whether it was an agreement which required Senate sanction.<sup>3</sup> In contrast with most agreements concluded by the President acting in this capacity, this one made engagements intended to be not temporary but permanent; indeed, 'in its general principle,' it has outlived most of the treaties of the century past.<sup>4</sup> Under his military power the President has made agreements with Mexico providing for the reciprocal crossing of the frontier in pursuit of marauding Indians and for the passage of Mexican troops through territory of the United States.<sup>5</sup>

The most important exercise of this making of military agreements

<sup>1</sup> Crandall (*Treaties*, 117–18) cites many illustrations. See account of the controversy over President John Adams's surrender of Thomas Nash to the British authorities, without a judicial hearing. Corwin (*op. cit.*, 99–103) quotes argument by John Marshall, then a member of the House, defending the President's course.

<sup>2</sup> Page 615.

<sup>3</sup> *Messages*, II, 36.

<sup>4</sup> Crandall, *Treaties*, 102–03.

<sup>5</sup> May 12 and June 6, 1882; June 4, 1896. Quincy Wright (*op. cit.*, 242) cites decisions of Supreme Court justifying such agreements: *Tucker v. Alexandroff*, 183 U.S. 424, 435; *The Exchange v. McFaddon*, 7 Cranch, 116, 139. In January, 1924, Mexican troops were allowed to cross the territory of the United States in pursuit of insurrectionists. J. Fred Rippy, 'Some Precedents of the Pershing Expedition into Mexico,' *Southern Historical Quarterly* (April, 1921), 313–16; Malloy, *op. cit.*, 1144 ff. and 1170 ff.; 46th Cong., 3d sess., *House Executive Document* 1.

has been in the President's assent to a general armistice. Its terms may set forth the conditions which are to be embodied in the formal treaty of peace presently to be negotiated. Thus, the main features of the Treaty of Paris of December 10, 1898, were embodied in the 'protocol agreement embodying the terms of a basis for the establishment of peace,' signed August 12, 1898.<sup>1</sup> Twenty years later President Wilson's 'fourteen points' were accepted as the basis for the armistice of November 11, 1918.<sup>2</sup> In both of these instances, 'the defeated enemy alleged that the conditions on which it had agreed to end hostilities were not carried out in the definitive treaty.' Wright concludes:

Clearly an armistice ought not to affect the political terms of peace beyond the minimum necessary to bring hostilities to an end. Within this minimum, however, the President, as Commander-in-Chief, is competent to conclude armistices, and his agreement ought to be observed by the Senate in consenting to the definitive peace treaty.<sup>3</sup>

Many a *modus vivendi* has been made by the President without submitting this arrangement to the Senate. In some instances they have covered matters of great importance. For example, the agreement of October 20, 1899, in regard to the Alaskan boundary remained in force for several years till adjustment was reached by arbitration.<sup>4</sup> Pending ratification of the proposed fisheries treaty of February 15, 1888, protocols were executed to afford a *modus vivendi* as to American fishing vessels in Canadian waters. The proposed treaty failed of ratification, but for more than a score of years this *modus vivendi* was continued in practical effect.<sup>5</sup>

<sup>1</sup> Malloy, *op. cit.*, 1688-89. For President's power as to an armistice, see C. A. Berdahl, *War Powers of the Executive in the United States*, 232-37.

<sup>2</sup> Quincy Wright, *op. cit.*, 241. On the obligation of armistices, he cites Moore, *Digest of International Law*, VII, 336. 'Military agreements with the Allied Powers in great number and variety were entered into by President Wilson upon our entrance into the World War. Some of the few that are known deal with such important matters as loans, exchange of munitions and supplies, and the placing of the American forces at the disposal of the English and French commanders.' (Everett Kimball, *The Government of the United States*, 551.) The informality of some of these executive agreements of great importance is illustrated by the following: 'It [the "Cable Convention"] was not a formally signed protocol, but we had a prolonged and intimate discussion on the subject and nobody has any doubt as to what was agreed upon.' President Wilson, in response to question, at White House Conference, Aug. 19, 1919, with the Senate Committee on Foreign Relations. *Hearings on the Treaty of Peace with Germany*, 506.

<sup>3</sup> Quincy Wright, *op. cit.*, 241. See also the protocol between the several powers at the conclusion of the 'Boxer' troubles in China, Sept. 7, 1901, Malloy, *op. cit.*, 2006-12.

<sup>4</sup> Under the treaty of Jan. 24, 1903. Crandall, *Treaties*, 113.

<sup>5</sup> S. Doc. 870, 61st Cong., 3d sess., 206; Crandall, *Treaties*, 112, n. 32.

Our diplomatic history contains scores of agreements as to the settlement of claims for injuries to the persons or property of American citizens in foreign lands. The practice in regard to these has not been uniform; the same President has adjusted some controversies by negotiating a claims convention while settling others by an executive agreement.<sup>1</sup> Though Cass had declared as early as 1859 that it was not necessary to submit such conventions to the Senate, that continued to be the general practice prior to 1870. In the period between 1870 and 1903, Barnett lists twenty such arbitration agreements which were not referred to the Senate; they were concluded with twelve foreign states, four of them with Haiti, and four with Spain, the only old-world state.<sup>2</sup>

As the sole organ of communication with foreign governments, the President makes many determinations, without consulting the Senate.<sup>3</sup> Thus, in issuing his neutrality proclamation of 1793, President Washington construed our treaty of alliance of 1778 as not requiring us to come to the aid of France in the war in which she was then engaged. From time to time a President has entered into an

<sup>1</sup> J. W. Foster, *Yale Law Journal*, XI, 72. 'No case has yet occurred where the Executive has entered into an agreement for the adjustment by arbitration of the private claims of a foreigner against the United States without securing the approval of the Senate in the form of a convention.' The cases which J. B. Moore cites (*Digest of International Law*, V, 211) as settled without the agreements having been submitted to the Senate, were fifteen cases of Americans' claims against foreign governments. 'The correct attitude in this matter was illustrated by President Wilson in a memorandum attached to his agreement with Premier Lloyd George of Great Britain regarding the disposition of the former German ships. "I deem it my duty," said the President, "to state, in signing this document, that, while I feel confident that the Congress of the United States will make the disposal of the funds mentioned in the agreement, I have no authority to bind it to that action, but must depend upon its taking the same view of the matter that is taken by the joint signatories of this agreement.'" J. M. Mathews, *op. cit.*, 178; *Cong. Rec.*, 3429, Feb. 21, 1920.

<sup>2</sup> J. T. Barnett, *Yale Law Journal*, XV, 18-27.

'Arbitration Treaties and Conventions Submitted to and Acted upon by the Senate' (S. Doc. 158, 58th Cong., 3d sess.) presents a list of 44 such general and particular treaties or arbitration articles in treaties. It includes none ratified later than Feb. 10, 1905. Of the 44 thus submitted, the Senate rejected only one, the general arbitration treaty with Great Britain, concluded Jan. 11, 1897. Of the 43 ratified, six were amended by the Senate. The Senate's proceedings upon the rejected treaty of 1897 are to be found in S. Doc. 161, 58th Cong., 3d sess. For a list of 'Arbitration Agreements Not Referred to the Senate,' see the same document. There were 15 such agreements with 12 foreign governments between 1870 and 1903.

<sup>3</sup> The King of Sweden having addressed a letter to 'The President and Senate of the United States,' Secretary of State J. Q. Adams, in a letter to the American *chargé d'affaires* to Sweden, May 24, 1818, wrote: 'Neither the House of Representatives nor the Senate, nor the two Houses in Congress assembled hold correspondence with foreign princes or states.... The authority to receive foreign ministers is vested exclusively in the President, and in practice all letters from foreign sovereigns, however addressed, are opened and answered only by him.' J. B. Moore, *Digest of International Law*, IV, 462.

agreement as to the basis of future negotiations.<sup>1</sup> There are instances where an exchange of diplomatic notes has concluded highly significant agreements as to executive policy. The astonishing innovation in this development was the series of notes exchanged in 1899 and 1900 by Secretary Hay with the Governments of Great Britain, France, Germany, Russia, Italy, and Japan, whereby they were all brought, with the United States, to give their final and definitive assent to the 'Open-Door' policy in China. A week after this agreement had been concluded, in response to their request of March 24, 1900, the President transmitted to the House of Representatives a report from Secretary Hay with the entire correspondence.<sup>2</sup>

The 'Boxer Protocol' of 1901 was in substance a treaty. It not only set forth the signatory powers' agreement as to the termination of military operations, but also fixed the form and amount of the indemnity to be paid by China, and laid down other conditions with which she must comply. Yet, although the Senate was in session, this protocol was not submitted to it for ratification, nor did the President seek from the Senate confirmation of the appointment of the able diplomat, W. W. Rockhill, whom he sent as the plenipotentiary of the United States for the negotiation of these important agreements.<sup>3</sup>

In 1908, an exchange of notes took place between Secretary of State Root and Baron Takahira, Japanese Ambassador at Washington, declaring the policy of the United States and Japan in the Far East. In a statement issued by the Ambassador, he said:

The notes are simply in the form of a declaration, and are not a treaty or agreement. They are simply a reaffirmation of what was declared by the two governments years ago, or a definition of the understanding already existing.... It is something like a transaction between trusted friends. [The 'outline of that common aim, policy, and intention' was drawn with extreme skill to avoid arousing Senate antagonism. No 'pledge' was given. The last article in the outline stated:] Should any event occur threatening the *status quo* as above described, or the principle of equal opportunity as above defined, it remains for the two governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.<sup>4</sup>

<sup>1</sup> Crandall, *Treaties*, 112.

<sup>2</sup> Malloy, *op. cit.*, 244-60.

<sup>3</sup> W. F. Johnson, *American Foreign Relations*, 288-92; Quincy Wright, *op. cit.*, 241; J. M. Mathews, *op. cit.*, 69; H. M. Wriston, *op. cit.*, 798-99.

<sup>4</sup> Notes of Nov. 30, 1908, Malloy, *op. cit.*, 1045-47.

Nevertheless, in the Senate this 'declaration' was looked upon with jealous suspicion. Senators insisted that it was in reality a treaty, and that it should be submitted to the Senate for approval, else a dangerous precedent would be established in the President's usurping treaty-making power.<sup>1</sup>

The Lansing-Ishii Agreement of 1917, wherein it was declared, 'the government of the United States recognizes that Japan has special interests in China, particularly in the part to which her possessions are contiguous,' proved to be a source of controversy and friction. It was negotiated in secret, and was first announced to the Chinese Government from Tokio in a form which seemed to imply a recognition of Japanese paramountcy in China — an interpretation which Secretary Lansing disavowed.<sup>2</sup> It was denounced as an invasion of the treaty-making power, and a dubious declaration of American policy in the Far East. After the treaty signed by the Washington Conference, February 6, 1922, had pledged the contracting parties neither to 'seek, nor support their respective nationals in seeking, any arrangement which might purport to establish in favor of their interests any general superiority of rights,' in China, Japan was induced to abandon this agreement which had aroused great suspicion in China. By an identic statement, April 14, 1923, it was announced in Washington and in Tokio that the Lansing-Ishii Agreement had been cancelled and was 'of no further force or effect.'<sup>3</sup>

<sup>1</sup> These views were attributed by press dispatches to many Senators, especially Bacon, Culberson, Money, Rayner, and Simmons, several of whom were said to be eager to debate the issue in open session. At the request of Senator Culberson, the correspondence leading up to the exchange of notes was sent by Secretary Root to the Senate. It was received in executive session and referred to the Committee on Foreign Relations. (Washington dispatch, Dec. 8, 1908, to *Boston Herald*.)

<sup>2</sup> Nov. 2, 1917, Malloy, *op. cit.*, 2720–22. To the Committee on Foreign Relations Secretary Lansing later declared most positively that by the State Department this agreement was not considered as an endorsement of the 'Twenty-One Demands,' and added: 'I think I can say . . . that one of the very reasons why that Lansing-Ishii Agreement was entered into was on account of the Twenty-One Demands, and the attitude that China was taking toward Japan, in order to secure from Japan a re-declaration of the Open-Door policy which she did in that agreement. It was a mere matter of declaration of a mutual policy between Japan and the United States in regard to their attitude toward China. It did not directly affect any rights of China, except that the two Governments agreed they would keep their hands off.' Aug. 6, 1919, U.S. Senate Hearings: *Treaty of Peace with Germany*, 66th Cong., S. Doc., 106. The text of that agreement was printed in *Cong. Rec.*, 6797–98, Oct. 13, 1919, in connection with a speech by Norris in criticism of the agreement.

See *Foreign Relations for the Year 1922*, issued by the Department of State, June 9, 1938, for the text and discussion of a suppressed clause in the Lansing-Ishii Agreement, and the reasons for its suppression.

<sup>3</sup> Malloy, *op. cit.*, 3825–26.

The executive agreement which challenged most criticism on the ground that it was an invasion of the Senate's share in treaty-making was the one entered into by President Roosevelt with the Government of Santo Domingo.<sup>1</sup> In 1905 that country's finances were in chaotic condition, and European creditors were pressing for payment with an importunity that seemed to threaten intervention which might lead to serious complications with our interpretation of the Monroe Doctrine. February 15, 1905, the President laid before the Senate a treaty under which the United States agreed to undertake 'the adjustment of all the Dominican debts, foreign and domestic,'<sup>2</sup> and to that end to take charge of and administer the custom-houses. He strongly urged the Senate's consent to this treaty as a 'practical test of the efficiency of the United States in maintaining the Monroe Doctrine.' But the end of the session was at hand, and the Senate was not to be hurried. In his *Autobiography*, President Roosevelt tells the sequel.

Enough Republicans were absent to prevent the securing of a two-thirds vote for the treaty, and the Senate adjourned without any action at all, and with the feeling of entire satisfaction at having left the country in the position of assuming a responsibility and then failing to fulfill it. Apparently the Senators in question felt that in some way they had upheld their dignity. All that they had really done was to shirk their duty. Somebody had to do that duty, and accordingly I did it. I went ahead and administered the proposed treaty anyhow, considering it as a simple agreement on the part of the Executive which would be converted into a treaty whenever the Senate acted. After a couple of years the Senate did act, having previously made some utterly unimportant changes which I ratified and persuaded Santo Domingo to ratify.... The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo. But the Constitution did not forbid what I did. I put the agreement into effect, and I continued its execution for two years before the Senate acted and I would have continued it until the end of my term, if necessary, without any action of Congress.<sup>3</sup>

<sup>1</sup> A clear account of this entire transaction is given by J. H. Hollander, 'The Convention of 1907, between the United States and the Dominican Republic,' *American Journal of International Law* (April, 1907), 287-96. Under the *interim* arrangement, Dr. Hollander was the man, appointed by President Roosevelt, who supervised the collection of the Dominican customs revenues, and the segregation of 55 per cent of the proceeds, to be ultimately applied to the discharge of the debt.

<sup>2</sup> J. B. Moore, *Principles of American Diplomacy*, 1918 ed., 261-64.

<sup>3</sup> Pages 551-52. The new treaty was concluded Feb. 8, 1907, and its ratification advised by the Senate, Feb. 25, 1907.

Walter Lippmann, in *Men of Destiny*, 157-59, cites another illustration of Roosevelt's entering into a secret understanding about a great international question in relation

How this procedure looked to his senatorial critics appears in their angry debate. Said Senator Tillman:

It [the treaty] was in our keeping, and no longer in charge of the President. We had not acted but had adjourned without action, (and), as I understand the limitations of the President's power in connection with treaties, he should have said: 'I am powerless to do anything without usurpation, unless something brand-new occurs in the affairs of Santo Domingo.' The President was not warranted in doing what he did.<sup>1</sup>

Senator Rayner said:

The appointment of an American agent as an officer of Santo Domingo to collect its customs was simply a cover and an evasion. . . . Now, when you add to this the facts that our warships are in harbors of the island ostensibly for the purpose of protecting American interests, but in reality protecting the officials of the island against any menace from without and revolution from within, you have the establishment of a sovereignty or a protectorate without a word from Congress or the Senate sanctioning the same. . . . It is evident that the President under his unquestioned authority to make Executive agreements, might go to great lengths and make arrangements with a foreign power far more serious in character than are often stipulated by formal treaty.<sup>2</sup>

In view of the long list of treaties which the Senate has rejected outright and of others which it has so amended that they were never ratified, it was an arresting exercise of power that a President should 'go ahead and administer the proposed treaty anyhow, considering

to which the Senate was not consulted. 'President Roosevelt wrote to George Kennan, who had proposed an open alliance with Japan and Britain, that he was "talking academically. . . . I might just as well strive for the moon as for such a policy as you indicate. Mind you, I personally agree with you." And yet he gave Count Katsura fairly definite assurance much in the spirit of a man who obeys the Volstead Act but has a refined bootlegger.' The *Kokumin* said of that 'conversation': 'In fact, it is a Japanese Anglo-American alliance.' (Oct. 4, 1905.) See Tyler Dennett, *Roosevelt and the Russo-Japanese War*, 112.

<sup>1</sup> Senate debate, Jan. 23, 1906, *Cong. Rec.*, XL, 1423-24. Senator Spooner claimed that a 'brand-new situation' did develop, which justified the President's action. For Secretary Hay's relation to the protocol, see letter quoted in editorial in *New York Sun*, July 3, 1905.

<sup>2</sup> P. S. Reinsch, *Readings in American Federal Government*, 79 ff. *Autobiography*, 551. In another passage he sets forth his view of the Executive's duty thus: 'I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.' *Ibid.*, 289.

Ex-President Taft later expressed his dissent from this doctrine, that the Executive 'is to play the part of a Universal Providence and set all things right, and that anything that in his judgment will help the people, he ought to do, unless he is expressly forbidden not [*sic*] to do it.' W. H. Taft, *Our Chief Magistrate*, 140.

it as a simple agreement on the part of the Executive which would be converted into a treaty whenever the Senate acted.<sup>1</sup> Meantime, every essential feature of the treaty was being carried into effect, with our warships in Dominican waters by the President's order.

Santo Domingo has repeatedly been the scene of the stretching of the President's power without sanction of the Senate. Thus, even after the Senate had rejected the treaty for annexation of Santo Domingo which had been negotiated, without any official warrant, by one of Grant's private secretaries, by the President's orders the strong naval force which he had sent to the island continued to prevent attack from Haiti and internal uprising. This led to fierce denunciation by Sumner and Schurz on the floor of the Senate.<sup>2</sup> Again, in that troubled republic, American forces, as Professor Corwin says, 'instituted, on November 29, 1916, a military occupation, "exercising military government" pending the restoration of civil order, which action was justified by appeal to Article III of the Treaty of 1907 with Santo Domingo.' In later years such intervention in the States of the Caribbean has been 'generally regularized by treaty arrangements.'<sup>3</sup>

Resort may be made to an executive agreement for the solution of a problem which might properly fall either within the field of a

<sup>1</sup> Similar language had been used by President Tyler (*Messages*, IV, 317-18) in declaring it his opinion that 'the United States having by treaty of annexation acquired a title to Texas which requires only the action of the Senate to perfect it, no other power could be permitted to invade... Texas pending your deliberations upon the treaty without placing itself in a hostile attitude to the United States,' and on that ground he justified the employment of our military means to repel Mexican invasion. This reply to the Senate's call for information brought bitter denunciation from Benton: 'It assumes Texas to be in the Union,... and to remain so till the Senate puts her out by rejecting the treaty. This is... reversing the functions of the Senate and making it a nullifying instead of a ratifying body. We are to dissent instead of consent; and until our dissent is declared, the treaty is acted on; and that, "even in the article of war"!' (*Cong. Globe*, XIII, Appendix, 568-76.) Tyler's treaty, unlike Roosevelt's, was ultimately rejected by the Senate.

<sup>2</sup> *Cong. Globe*, 42d Cong., 1st sess., part 1, 294 ff., March 27, 1871. For further discussion of controversies between the President and the Senate as to relations between this country and Santo Domingo, see S. F. Bemis, *op. cit.*, 403-04; 526-28.

<sup>3</sup> *Ibid.*, Appendix, 52, cited by Corwin, *op. cit.*, 162-63.

See the 'Platt Amendment' as to future relations of the United States with Cuba. (Malloy, *op. cit.*, 362-63.) For other illustrations of 'regularization' see treaty with Panama, 1903 (*ibid.*, 1349-57), and with Haiti, 1915 (*ibid.*, 2073-77).

May 29, 1934, the President transmitted to the Senate a new treaty with Cuba, to supersede that of May 22, 1903. He announced: 'I have previously declared that the definite policy of the United States from now on is one opposed to armed intervention.' Pittman announced: 'The report of the Committee is unanimous. We simply surrender our contractual relations under the Platt Amendment, and resort to international law.' The new treaty was ratified without a dissenting vote. *Cong. Rec.*, 10116.

treaty or of an Act of Congress, yet which would present great embarrassments if dealt with by either the treaty-making or the legislative power. No better illustration could be cited than the agreement under which for fifteen years the emigration of Japanese laborers to the United States was controlled. In the first decade of this century the rapidly growing emigration of Japanese laborers to the states of the Pacific coast caused great apprehension, and a drastic bill was introduced in the House of Representatives, prohibiting the immigration of Japanese and Korean laborers. While this was before the House Committee on Foreign Affairs, a 'gentlemen's agreement' was entered into by Secretary Root and the Japanese Ambassador at Washington, whereby the Japanese Government undertook to control such emigration by refusing to grant passports to Japanese laborers seeking to come to the United States. This agreement was not proclaimed by the Executive nor was it communicated to the Senate.<sup>1</sup>

Under this agreement the exclusion of Japanese laborers was effectively accomplished: even limitations not included in its terms were put into effect. But the movement in favor of Japanese exclusion was advancing, and in 1923, despite the efforts of the Secretary of State to have the matter still left to be handled by diplomacy, the House passed a bill providing for the exclusion of 'nationalities not eligible to American citizenship.' This aroused earnest protest from the Japanese Ambassador, who presented evidence that the enactment of the bill superseding the 'gentlemen's agreement' would exclude only 146 Japanese a year. When this measure was before the Senate, its Committee on Immigration proposed an amendment which would have exempted from the operation of the law aliens entitled to enter the United States under the provisions of a treaty '*or of an agreement relating solely to immigration.*' At this juncture the Japanese Ambassador sent to the Secretary of State a letter which he transmitted at once to the Chairman of the Committee on Immigration. The Ambassador professed his Government's 'willingness to discuss the desirability of modifying the terms of the "gentlemen's agreement," if desired by the American Government,' and protested that the enactment of the pending measure would inevitably bring 'grave consequences... upon the otherwise

<sup>1</sup> The nearest approach to its official publication was the appearance of the 'condensed substance' of its terms in the *Report (125-26) of the United States Commissioner-General of Immigration* for the year 1908.

happy and mutually advantageous relations between our two countries.'<sup>1</sup>

Publication of this letter was fatal to the committee's amendment, intended to secure the continuance of the 'gentlemen's agreement.' From the first, many Senators had objected to that agreement as an encroachment by the Executive upon the treaty-making power of the Senate. To this number were now added many new foes to the committee's amendment because of resentment that the Ambassador of a foreign power should attempt to dictate this country's immigration policy, under what they termed a 'threat of "grave consequences."' Accordingly, the committee's amendment, abandoned by its own sponsors, was defeated by vote of 76 to 2, and the bill was passed by the Senate by a vote of 69 to 9.<sup>2</sup>

In returning the bill to the House with his signature, May 26, 1924, the President sent with it a formal statement, expressing his regret at 'the impossibility of severing from it the exclusion provision which, in the light of existing law, affects especially the Japanese.' He noted that the bill 'expresses the determination of the Congress to exercise its prerogative in defining by legislation the control of immigration instead of leaving it to international arrangements,' and continued:

But we have had for many years an understanding with Japan by which the Japanese Government has voluntarily undertaken to prevent the emigration of laborers to the United States; and in view of this historic relation and of the feeling which inspired it, it would have been much better, in my judgment, and more effective in the actual control of immigration, if we had continued to invite the co-operation which Japan was ready to give, and had thus avoided creating any ground for misapprehension by an unnecessary statutory enactment. That course would not have derogated from the authority of the Congress to deal with the question in any exigency requiring its action. There is scarcely any ground for disagreement as to the result we want. But this method of securing it is unnecessary and deplorable at this time. If the exclusion provision stood alone, I should disapprove it without hesitation, if sought in this way, at this time.

Despite this exceptional action of the President, intended to minimize the serious international consequences of the passing of

<sup>1</sup> Published in evening papers of April 11, 1924. This communication for the first time quoted in detail the provisions of the 'gentlemen's agreement' — yet this letter referred to it as 'embodied in a series of long and detailed correspondence, between the two Governments, publication of which is not believed to serve any good purpose.'

Note the use of the phrase 'most serious consequences' in Secretary Hull's protest of Aug. 25, 1935 (p. 676, n. 3).

<sup>2</sup> May 15, 1924, *Cong. Rec.*, 8589.

the law, there was a prodigious outburst of resentment in Japan. It was predicted that the Japanese Government would appeal the issue to the League of Nations. Instead, its immediate action was the sending of a communication characterized as 'perhaps the most outspoken and direct communication of this character which has ever been received by America through diplomatic channels.'<sup>1</sup> After setting forth the history of the dealings between the two Governments as to immigration, it concluded:

Accordingly, the Japanese Government consider it their duty to maintain and to place on record their solemn protest against the discriminatory clause in section 13 (C) of the immigration act of 1924, and to request the American government to take all possible and suitable measures for the removal of such discrimination.

To this communication Secretary Hughes responded, June 17, in a note which called attention to the fact that the President would have preferred that immigration continue to be regulated by a 'gentlemen's agreement' rather than by a statutory enactment.

The advisability of such an enactment necessarily remained within the legislative power of this Government to determine. As this power has now been exercised by the Congress by the enactment of the provision in question, this legislative action is mandatory upon the executive branch of the Government and allows no latitude in the exercise of executive discretion as to the carrying out of the legislative will expressed in the statute.<sup>2</sup>

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HAS THE SENATE ENCROACHED UPON  
THE EXECUTIVE IN TREATY-MAKING?

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There can be no question that among the great nations of the world in the matter of treaty-making the United States is the hardest to 'do business with' and to 'do business for.' Rightly or wrongly, most of the blame for this has been laid at the door of the Senate Chamber. Exasperated representatives of foreign nations have often protested that they had entered into a compact with the United

<sup>1</sup> *Washington Post*, May 27, 1924.

<sup>2</sup> *Ibid.*, June 19, 1924.

States, only to find that all their negotiations and concessions came to naught, because of the Senate's refusing to give its consent to ratification, or because of its loading the treaty with amendments or reservations which mutilated it beyond recognition.<sup>1</sup> Since 1890 there has been hardly a President or an outstanding Secretary of State who has not deplored the 'encroachments' of the Senate upon the domain of the Executive, and many of our ambassadors abroad and Cabinet members at home, who have seen treaty-making from responsible positions in close touch with the difficulties of conducting international relations, have sounded the same note, not merely of impatience but of alarm. One of the most vigorous critics, George W. Wickersham, Attorney-General in President Taft's Cabinet, declared that the continued 'unconstitutional invasion of Executive power by the Senate' has made the treaty-making machinery of the United States 'so complicated as to be unworkable.'<sup>2</sup>

In popular parlance, 'the Senate is the graveyard of treaties.' A harassed Secretary of State declared:

A treaty entering the Senate is like a bull going into the arena; no one can say just how or when the final blow will fall — But one thing is certain — it will never leave the arena alive.<sup>3</sup>

On the other hand, Senator Lodge, whose studies of Senate history and practice made him the recognized champion of Senate prerogative, asserted that the most dangerous treaty-making encroachments, not to say usurpations, in recent years had been made by the Executive. He emphasized the duty of every government to take into account the real nature of the treaty-making power in the nation with which it is negotiating, and easily proved the absurdity of a Foreign Secretary's professing surprise or resentment — as did Lord Lansdowne — that the Senate should amend a treaty which had been negotiated by the plenipotentiaries of the two countries. He insisted that under the Constitution the Senate is given 'an equal share in treaty-making,' and that, instead of attempting usurpation, it has acquiesced in the Executive's taking the initiative in the pre-

<sup>1</sup> J. W. Foster (in *Yale Law Journal*, II, 72) quotes the *Spectator's* reference to 'the ill manners of the Senate,' and its assertion that this body is ignorant of diplomatic usage and certain 'to act in the most indiscreet and objectionable manner possible'; and the London *Times* of Sept. 26, 1901, declared: 'It has become, there can be no doubt, a part of the senatorial tradition that every treaty submitted to the Senate must be tinkered up, if only to warn the Executive branch of the Federal Government that it is the servant and not the master.'

<sup>2</sup> Page 713.

<sup>3</sup> W. R. Thayer, *John Hay*, II, 393.

liminary negotiations of treaties, not even requiring that the names of envoys or their instructions be submitted to the Senate for approval. He asserted that there is ample constitutional basis for the Senate's amending treaties as a part of the negotiation process, and that the precedents therefor are notorious. He proved that from the very first the Senate has not hesitated to modify treaties, and that it added an amendment to the Jay Treaty, the most important one negotiated while Washington was President. To show that the practice had been well known and recognized as proper by other governments he adduced a long list of treaties, amended by the Senate between 1789 and 1900, each of which was subsequently ratified by the President and the other signatory power.<sup>1</sup>

Reference has been made to this list by later writers on American treaty-making.<sup>2</sup> After all the necessary corrections have been made, there remains a list of fifty-seven Senate-amended treaties which were ratified during that period. Yet this record does not support the implication that Senate assertiveness in the field of treaty-making has not grown, and that in recent years it has not been growing at an increasing rate. In the first place, a grouping of the treaties chronologically shows that in the first forty years only four treaties were amended by the Senate and later ratified; in the second forty years, twenty-one treaties were thus amended and ratified; in the third forty years, thirty-two; and in the period between 1909 and 1923, seven. If the frequency of Senate amending seems to have slackened, it should be observed that almost the entire development of 'reservations' has taken place since 1900.<sup>3</sup>

Nor should the fact be overlooked that not less than twenty-four treaties amended by the Senate failed to become effective either because the President refused to exchange ratifications or because the other signatory declined to accept the changed treaty.<sup>4</sup> The Senate's independent judgment — for the exercise of which there is, of course, full constitutional warrant — is further evidenced by the large number of treaties that have been rejected by the Senate — about eighteen between 1824 and 1868, and thirteen between 1869

<sup>1</sup> *A Fighting Frigate*, 219–56. List on pp. 253–54.

<sup>2</sup> Quincy Wright, *op. cit.*, 253; Foster, *op. cit.*, 276.

<sup>3</sup> Only one of the fourteen treaties with individual nations (Korea, 1883) and two of the international conventions, ratified with Senate reservations, antedate 1900: the General Act for the Repression of African Slave Trade (Brussels, 1890), and the Supplementary Industrial Convention (Madrid, 1891).

<sup>4</sup> Pages 608; 637.

and 1900.<sup>1</sup> Not a few others have 'died a not unexpected death' in the Committee on Foreign Relations. In recent years the favorite method of killing a treaty is to smother it with obviously impossible reservations.

A study of the lists reveals another pertinent fact. Of the large number of treaties amended or rejected in the first eighty years of our diplomatic history, not a few were with minor states which as sovereign powers have long since disappeared from the map. Treaties of trade or extradition with Baden, Bavaria, Brunswick, Hesse, the Orange Free State, Saxony, the Two Sicilies, and Tunis no longer tax the Senate's treaty-making judgment. Nor since 1900 have amendments or reservations been imposed upon treaties of amity and commerce and navigation with Persia, Siam, or Tonga, nor upon treaties regulating duties on liquors with Zanzibar. But during those recent years the Senate has killed, by direct rejections or by its amendments and reservations which in many cases were but indirect rejections, treaties with such states as France, Great Britain, Japan, Mexico, and the major states of South America.

Viscount Grey declared that the American Constitution 'not only makes possible, but, under certain conditions, renders inevitable conflict between the Executive and Legislature.'<sup>2</sup> In the first forty years of our history under the Constitution, despite the seriousness of our diplomatic problems, such conflicts were infrequent, it may be because the Presidents of the period were themselves experienced in diplomatic service. In almost every instance the President's policy prevailed. During much of the second period, 1829 to 1869, the Presidents were not the real leaders of their parties, and in spite of the efforts of some very able Secretaries of State, the Senate developed jealousy of executive leadership in foreign affairs which led to more frequent amendment or rejection of treaties.<sup>3</sup> In the period

<sup>1</sup> Pages 625-26.

<sup>2</sup> Letter to the *Times*, Jan. 31, 1920, quoted by Quincy Wright, *op. cit.*, 361.

As to the elements of inevitable friction inherent in American treaty-making a former Senator writes: 'Since it [the Constitution's threefold distribution of the powers of government] is accompanied by a treaty-making provision which tends to irritate the President, to inflate the Senate and wound the susceptibilities of the House, it is little short of amazing that on the whole the plan has worked so well.' G. W. Pepper, *Family Quarrels*, 4-5.

<sup>3</sup> Writing in 1907, Professor Paul S. Reinsch stressed the fact that from Monroe's becoming Secretary of State in 1811 to Blaine's resignation in 1892, with the exception of brief interregna aggregating altogether less than a year and a half, and with the exception of Evarts (who later became a Senator), the position of Secretary of State had been constantly held by men who had been Senators. 'Since the resignation of Mr. Blaine an entirely new system has come into use, Senator Sherman being the

since the Civil War immigration has made our population cosmopolitan and bettered means of communication have carried American trade to the ends of the earth. Not only have these changes made our international relations vastly more complicated, but they have multiplied the conditions likely to lead to conflict between the Executive and the Senate in treaty-making.<sup>1</sup>

According to Jay the framers of the Constitution were induced to assign the making of treaties to the President, 'by and with the advice and consent of the Senate,' by the imperative need of secrecy and dispatch.<sup>2</sup> They believed that neither could be attained in a body as large as the House of Representatives. Yet the present Senate is larger by half than the House under the first apportionment, and comes from an electorate with far more intense racial, economic, and political antagonisms than those of Jay's time.<sup>3</sup> Opinions may differ as to the degree to which secrecy or dispatch in treaty-making is now to be desired; but it is certain that in the handling of any treaty of major importance neither secrecy nor dispatch is being attained.

Professor Wright has well emphasized what Jay had stressed in the *Federalist* — the abiding need for both concentration of authority and popular control in foreign relations. The initiative must be taken by the President.

The very qualities which are needed for negotiation — quickness of mind, direct contact, adaptiveness, invention, the right proportion of give and take — are the very qualities which masses of people do not possess.<sup>4</sup>

Yet at the time when world problems are growing more difficult of solution and when even in England there is strong advocacy for

only Secretary of State who had also been a member of the Senate. Under these circumstances, it is not surprising that there should have been more friction on foreign matters [since 1892] than existed during the earlier years of our national life.' (*American Legislatures and Legislative Methods*, 95 ff.) Bringing the Reinsch comparison down to 1937, of the seventeen Secretaries of State in the forty-five years since Blaine resigned, only four (Sherman, Knox, Kellogg, and Hull) had been Senators. Root saw distinguished service in the Senate after leaving the Department of State.

<sup>1</sup> Quincy Wright, *op. cit.*, 366–68.

<sup>2</sup> The *Federalist*, No. 64. In his message to the House of Representatives, of March 30, 1796, Washington stressed this same point: 'The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members.' (*Messages*, I, 194.)

<sup>3</sup> Note the delay of twenty-two years in securing Senate consent to the ratification of the Isle of Pines Treaty (p. 626).

<sup>4</sup> Quincy Wright (*op. cit.*, 363–68) quotes as above, from Walter Lippmann, *The Stakes of Democracy* (1917), 26, 29.

placing a firmer legislative curb upon treaty-making, no one in America would favor turning that function over to the Executive alone. Said Senator Kellogg, a 'mild reservationist,' during the debate on the Treaty of Versailles:

Is it to be supposed that the Senate knows less of the proper obligations to impose upon this country than our commissioners, or is less qualified to define with accuracy these obligations and to determine the duty to be performed under the treaty? I have no patience with the sentiments so often here expressed that the Senate should entirely abrogate its functions.<sup>1</sup>

In not a few instances the 'collective judgment' of the Senate has disclosed defects which had escaped the negotiators' notice and has safeguarded important American interests.<sup>2</sup> Yet to our recent Presidents and Secretaries of State, who have given the most profound study to the conditions surrounding an international problem and have devoted their utmost efforts to securing for this country the best results attainable, it has often seemed that the mangling which the treaty received represented something quite other than the Senate's 'collective judgment.'

In a letter to the American Minister in London, written a few days after the Senate's rejection of the Anglo-American arbitration treaty in May, 1897, Secretary Olney said:

It must be borne in mind that the Senate is now engaged in asserting itself as the power in the national government. *It is steadily encroaching* on the one hand on the executive branch of the government, and on the other on the House of Representatives. . . .

This aggressive attitude of the Senate towards other departments of the government is largely responsible for the treatment it has given the general arbitration treaty. After long protracted and troublesome discussion and negotiation, a perfected treaty was laid before the Senate by the Executive branch of the government exercising therein an undoubted constitutional function. The Senate immediately assumed an hostile attitude. The treaty, in getting itself made by the sole act of the Executive without leave of the Senate first had and obtained, had committed the unpardonable sin. It must be either altogether defeated or so altered as to bear an unmistakable Senate stamp — and thus be the means both of humiliating the Executive and of showing to the world

<sup>1</sup> Speech in Senate, Aug. 7, 1919, *Cong. Rec.*, 3689.

<sup>2</sup> Only a few days before the Senate's decisive vote of Nov. 19, 1919, rejecting the Treaty of Versailles, Henry White wrote to Lodge that he did not criticize the additions to the treaty, and commenting: 'My experience with treaties during my professional service has been that they have usually been improved by passing through the hands of the Senate. Such was the case with reference to the Hay-Pauncefote Treaty and many others.' (Nevins, *Henry White*.)

the greatness of the Senate. Hence, the treaty has been assailed from all quarters and by senators of all parties, although the present Executive advocated its ratification no less warmly than his predecessor. The method of assault has been as insidious as it has been deadly. A single sound objection to the treaty as signed has yet to be stated. Yet, awed by the universal public sentiment for the treaty and feeling compelled to seem to defer to it while in reality plotting to defeat it, senators have exhausted their ingenuity in devising amendments to the treaty. Before the treaty came to a final vote, the Senate brand had been put upon every part of it and the original instrument had been mutilated and distorted beyond all possibility of recognition. The object of the Senate in dealing with the treaty — the assertion of its own predominance — was thus successfully accomplished and would have been even if the treaty as amended had been ratified.<sup>1</sup>

In similar exasperation wrote Secretary Hay after the Senate had ratified the treaty with Spain in 1899:

A treaty of peace, in any normal state of things, ought to be ratified with unanimity in twenty-four hours. They wasted six weeks in wrangling over this one, and ratified it with one vote to spare. We have five or six matters now demanding settlement. I can settle them all honorably and advantageously to our own side, and I am assured by leading men in the Senate that not one of these treaties, if negotiated, will pass the Senate. I should have a majority in every case, but a malcontent third would certainly dish every one of them. To such monstrous shape has the original mistake of the Constitution grown in the evolution of our politics. You must understand it is not merely my solution the Senate will reject. They will reject, for instance, any treaty whatever, on any subject, with England. I doubt if they would accept any treaty of consequence with Russia or Germany. The recalcitrant third would be differently composed, but it would be on hand.<sup>2</sup>

The difficulty in large measure has arisen from that 'dubious excess of caution' which led the framers of the Constitution to require that in consenting to the ratification of a treaty two-thirds of the Senators present must concur. In the Federal Convention James Wilson opposed this provision, foreseeing that it would 'put it in the power

<sup>1</sup> Olney's biographer, twenty-five years later, interpreted the Senate's action more judicially: 'This resentful view of the Senate's action was natural enough at the time, but today it is possible to interpret what happened more charitably. The treaty was a novel departure in international affairs and very broad. It has been well said that our Constitution requires the Executive to lead in such matters and imposes upon the Senate the duty of keeping it from leading too fast for public opinion. Treaties depend more completely than do domestic laws on the sanction and support of the popular will. Public opinion is not clear about arbitration today, and it is obvious now that it was very little prepared in 1897.' Henry James, *Richard Olney and His Public Service* (1923), 150.

<sup>2</sup> Letter to Henry Adams, Aug. 5, 1899, *Letters of John Hay to Henry Adams, and Extracts from Diary*, III, 156.

of a minority to control the will of the people,' and Rufus King declared that such a majority was not necessary, 'since the Executive was here joined in the business.' Even Lodge felt doubts whether the two-thirds vote were not 'a too narrow restriction.'<sup>1</sup> Secretaries of State have often deplored the friction and the balking to which this provision gives rise. 'The irreparable mistake of our Constitution puts it into the power of one-third + 1 of the Senate to meet with a categorical veto any treaty negotiated by the President, even though it may have the approval of nine-tenths of the people of the nation.<sup>2</sup> Senators themselves have inveighed against this two-thirds requirement. It was during the many weeks of debate upon the treaties negotiated at the Washington Conference that John Sharp Williams said on the floor of the Senate:

Mr. President, I am a little tired of one situation under our constitutional government, although I worship the Constitution. I am tired of an international situation under which one man over one-third in this body — not representative of the people, but representative solely of the States — can defeat any international agreement into which the United States has proposed to enter.

If a Republican President had sent the Versailles Treaty to this body, three-fourths of you on the Republican side would have voted for it, including the Senator from Massachusetts (Mr. Lodge). And if President Wilson had sent these treaties to the Senate, two-thirds of you on the Democratic side would have voted for them, including the Senator from Nebraska (Mr. Hitchcock) and the Senator from Montana (Mr. Walsh). It seems to me it's about time we stopped our politics at the coast line.<sup>3</sup>

That 'malcontent 34 per cent' is made up of divers elements. Yet there are always many in the Senate who cannot 'stop their politics at the coast line.' Some Senators are jealously assertive of the Senate's prerogatives. To some a given treaty is anathema if negotiated by a President of the opposite party. To others the leadership of the President, although of their own party, may be personally repugnant. Racial and religious antagonisms play their part.<sup>4</sup> At the time when the Treaty of Versailles was before the

<sup>1</sup> 'The Treaty-Making Powers of the Senate,' in *A Fighting Frigate and Other Essays*, 255.

<sup>2</sup> John Hay, letter to Joseph H. Choate, Aug. 18, 1899. Thayer, *Life of John Hay*, II, 219.

<sup>3</sup> March 14, 1922, *Cong. Rec.*, LXII, 3855-56.

<sup>4</sup> On the final day of debate on adherence to the World Court, Jan. 27, 1926, Stephens of Mississippi divided the opponents of the Court into (a) those believing in the policy of isolation, (b) those moved by intense hatred of Woodrow Wilson, (c) those blinded by prejudice against England, and (d) those fearing a superstate controlled by a religious sect. 'There had been assembled together more inharmony of thought, more

Senate, according to current belief, there were members of the Senate's Committee on Foreign Relations who found it difficult to 'say a civil word' to Great Britain, to Japan, or to Mexico, the very nations with whom our relations bade fair to require most delicate treatment. Open debate of treaties in the Senate — urged as the symbol and the means of popular control — is not without its drawbacks, for it encourages the individual Senator, in chauvinistic harangues for the edification of his own state, or section, or racial or industrial bloc, to make mountains out of molehills by insisting upon amendments or reservations which will give the peculiar twist or 'understanding' most likely to promote his re-election.<sup>1</sup>

The severest criticism of our treaty-making procedure falls upon the Constitution's requirement of a two-thirds majority in the Senate's consent to ratification. Several investigators have recently attempted to determine how great a cost — in the number and in the character of 'lost' or 'defeated' treaties — this requirement has caused. Contrary to prevalent belief, the actual number of treaties that commanded a majority in the Senate, but 'failed' because the majority fell short of two-thirds of those present and voting, is surprisingly small. Professor Fleming's summary mentions only eight such treaties prior to 1933.<sup>2</sup>

discordant elements in ideas and beliefs than he had ever seen before. All Irish Catholic newspapers, for example, had bitterly denounced the Court as controlled by England, while the Klan organs were attacking it as dominated by the Pope.' *Cong. Rec.*, 2799–2801.

<sup>1</sup> With respect to most matters dealt with by treaties, however, the Senator is not tempted to 'play up to his constituency.' 'The foreign relations of the United States are seemingly of less interest to the people of the majority of our States than matters of domestic concern. For that reason, it has been said that certain Senators are free from a critical constituency when it comes to foreign affairs.' Letter of Charles Cheney Hyde, Feb. 2, 1928.

<sup>2</sup> *The Treaty Veto of the American Senate*, 304.

#### TREATIES DEFEATED BY LACK OF TWO-THIRDS MAJORITY

Date of Vote	Country	Vote	Subject
Jan. 5, 1883	Mexico	33 : 20	Convention for Retrying Claims
April 20, 1886	Mexico	32 : 26	Convention for Retrying Claims
June 27, 1860	Spain	26 : 17	Cuban Claims Convention
April 17, 1844	Zollverein	26 : 18	Reciprocity
June 1, 1870	Hawaii	20 : 19	Reciprocity
May 5, 1897	Great Britain	43 : 26	Arbitration
March 19, 1920	Multilateral	49 : 35	Versailles Treaty
Jan. 18, 1927	Turkey	50 : 34	Amity and Commerce
March 14, 1934	Canada	46 : 42	St. Lawrence Waterway
Jan. 29, 1935	Multilateral	52 : 36	Adhesion to the World Court

In Professor Fleming's opinion 'of the first eight of these "failed" treaties, only two were of vital importance to the country, yet in every case their passage would have notably improved our relations with a foreign state.' The rejection of the Olney-Pauncefote Treaty of Arbitration (which had been submitted to the Senate with

From a painstaking study of 'The Two-Thirds Rule in Senate Action Upon Treaties, 1789-1901,' Dr. R. Earl McClendon concluded that, although in that period sixteen treaties were defeated by the operation of that rule, only seven of them ultimately failed to secure Senate consent to ratification, and one of these seven was recalled by the President.<sup>1</sup>

But statements of the relative fewness of the treaties which have been defeated on the floor of the Senate by the operation of the two-thirds rule are far from telling the whole story. No student of this phase of our treaty-making can fail to realize that the rule's most calamitous effects are psychological. In the Senate it heartens any tiny group having a direct interest adverse to a pending treaty to attempt by delays and bargaining to persuade enough colleagues to join them to make up a 'recalcitrant one-third plus one.' Such an *ad hoc* bloc in our Senate can and does exercise a 'pathological obstruction' in the handling of our foreign relations such as is exercised by so small a minority in no other legislative body in the world. At the other end of Pennsylvania Avenue that two-thirds rule can never for a moment be put out of mind.

The record [of Senate votes] does not show from what wise measures the President or his Secretary has been estopped by perhaps unfounded fear of what a few Senators might do, nor is it demonstrable into what brusque and harmful actions the spectre on Capitol Hill has frightened them. In the light of my own reading and my own experience in Washington, I am confident that both misfortunes have frequently befallen.<sup>2</sup>

earnest advocacy by both President Cleveland and McKinley, p. 632) caused bad feeling between the two countries, but the Senate had already amended it so radically that it might not have proved satisfactory to either. On the St. Lawrence Waterway Treaty clashing sectional interests caused the vote to be very closely divided. In the final vote on the Treaty of Versailles (March 19, 1920) and on the World Court Adhesion (Jan. 29, 1935) a clear majority of the total membership of the Senate was recorded in favor of ratification; — in each case the shift of seven names from the nay to the yea column would have changed defeat to victory. But would President Wilson have brought himself to submit to the other powers the treaty weighed down with fifteen 'nullifying' reservations? If he had done so, would they have consented to exchange ratifications? In the case of the World Court Protocol, was there any certainty that the Senate's five reservations and other conditions of ratification would have secured unanimous consent from the scores of other powers already adherent to the Court? (Page 710.) In the case of each of the last three treaties listed above, the Senate made no order for the return of the treaty to the President, so it remained pending in the Senate. Seven years after the adverse vote on the treaty with Turkey, it was withdrawn by President Roosevelt (p. 637, n. 4).

<sup>1</sup> *American Journal of International Law* (Jan., 1932), 37-56.

<sup>2</sup> DeWitt Clinton Poole, 'Structural Improvements in the Administration of Foreign Affairs,' *Proceedings of the American Philosophical Society*, LXXII (1933), 77-86. Mr. Poole's opinion is based on twenty years of experience in the State Department or in the Foreign Service. For similar views of the psychological effects of the rule, see D. F. Fleming, *op. cit.*, 266-68.

Should this now recognized defect, the requirement of the two-thirds majority, be remedied by constitutional amendment? Getting an amendment adopted might not prove so difficult a task as the securing of agreement as to what the amendment should provide. The simplest proposal is to substitute for the two-thirds vote that of a mere majority of the Senators present, or, as some would prefer, a majority of the membership of the Senate. Since the President is 'here joined in the business,' it would seem as if no serious risks would be involved, especially as he would still have an absolute veto, since the actual ratification would have to be by him.<sup>1</sup>

Another suggestion is that the decision be given to a majority vote in each branch of Congress.

This would obviate the complaint of the House of Representatives and eliminate the ever-present possibility of inability to execute a treaty, valid at international law, because of refusal of the House to agree to appropriations for necessary legislation.<sup>2</sup>

It might make deadlocks less frequent between the President and the Senate, though that is by no means certain. It would, of course, abandon all attempt at secrecy, and would subject the treaty to amendment or reservation by both branches of Congress, with adjustments by compromise in conference committee.<sup>3</sup>

<sup>1</sup> Consent to treaties by a bare majority of the Senate was defeated in the Federal Convention by a single vote. Senator Owen proposed a constitutional amendment to that effect. (March 22, 1920, *Cong. Rec.*, 5009.) Four commercial treaties, rejected by minority votes of more than one-third, would have been ratified if a mere majority vote had sufficed. Such was the case with the Hawaiian Reciprocity Treaty of 1870 and the Lausanne Treaty with Turkey in 1927. The Olney-Pauncefote Treaty (rejected May 5, 1897; 43 Senators for, and 26 against) and the Treaty of Versailles (rejected March 19, 1920; 49 Senators for, and 35 against) had been so modified by the Senate that they might not have been ratified by the other signatory powers even if the majority vote in the Senate had carried its consent. It has been suggested that the proposed change in the Constitution might well require that the Senate 'majority' should represent states having more than half of the population of the United States. D. F. Fleming, *op. cit.*, 306.

<sup>2</sup> Quincy Wright, *op. cit.*, 368, n. 26. This method was proposed in the Federal Convention by Wilson. Only Pennsylvania voted for it. In recent years it has found wide approval: J. W. Garner, *American Foreign Relations*, 30 ff.; W. J. Bryan, Jackson Day Address, in *Cong. Rec.*, 1292, Jan. 9, 1920; H. L. McBain, *The Living Constitution*, 47-48; J. W. Davis, Address as President of American Bar Association, *Proceedings* (1923), 202; D. F. Fleming, *Treaty Veto of the American Senate*, 299-303.

Colonel E. M. House approved this proposal. In words reminiscent of Madison's in the Federal Convention, he queried: 'Why should the making of peace be made more difficult than the making of war? Our failure to ratify the Treaty of Versailles will probably be reckoned by historians as one of the greatest lapses of moral and intellectual leadership of which this nation has been guilty.'

<sup>3</sup> 'If the Executive is restless and unhappy in his partnership with the Senate, it is altogether natural that he should be unwilling to admit the House of Representatives to the firm.' G. W. Pepper, *Family Quarrels*, 30.

After listening for months to debate over what seemed to him disingenuous reservations proposed to the Treaty of Versailles and to the treaties signed at the Washington Conference, Senator John Sharp Williams suggested that the Twentieth Amendment should provide for consent to the ratification of treaties by 'majority of the two Houses in joint Congress assembled.'<sup>1</sup> That might at least secure dispatch. Of secrecy there would be none. Of 'collective judgment,' how much?

The most radical change which has been seriously put forward is the transfer to the House of Representatives of the entire power as to treaty-making now exercised by the Senate. This was urged by Samuel W. McCall, former Massachusetts Governor and Congressman. One special advantage of this method would be in the possibility of getting an indication of the American people's real wishes in regard to a treaty from Representatives chosen at a single election, before the question had been smothered by other issues and events.<sup>2</sup> But would not the mood of the day — the 'two-year pulse' — have undue influence?

It is not without academic interest to review these proposals of changes in the treaty-making power which might be effected by amending the Constitution, but the speed with which a two-thirds majority would be secured in the Senate for any such proposed amendment which would result in a material lessening of the Senate's prestige and power may be easily imagined.

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#### SENATE PROCEDURE AS TO TREATIES

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The Constitution associated the Senate with the President in the exercise of the treaty-making power, but the method of its exercise was left for them to determine. Within a few months after the opening of the First Congress, there was appointed a committee of the Senate on the mode of communication proper to be pursued between

<sup>1</sup> *Cong. Rec.*, LXII, 3856.

<sup>2</sup> S. W. McCall, 'Again the Senate,' *Atlantic Monthly* (Sept., 1920), 395; D. F. Fleming, *op. cit.*, 289.

the President and the Senate in the formation of treaties and making appointments to offices. In accordance with its recommendations, after two conferences with the President, the Senate made provision for the formalities to be observed when the President should meet the Senate in the Senate Chamber.<sup>1</sup> Despite Washington's immediate abandonment of oral communication after his first unsatisfactory experience with that procedure,<sup>2</sup> there has remained embalmed in the Senate rules from 1789 until this day a provision which accords to the President the seat of honor whenever 'he shall meet the Senate in the Senate Chamber for the consideration of Executive business.'<sup>3</sup> In accordance with that ancient provision, President Wilson took his seat as of right, when he came before the Senate, January 22, 1917,<sup>4</sup> to disclose his thought and purpose as to a League of Peace, and July 10, 1919, to present for the Senate's acceptance the Treaty of Versailles with the Covenant of the League of Nations.<sup>5</sup>

#### THE MANNER OF CONSIDERING TREATIES

##### *The Rule of 1801*

In January, 1801, the Senate first laid down a standing rule as to handling treaties. It provided for three readings on separate days. The first reading was for information only, and at that time no motion to reject, ratify, or modify the whole or any part was to be received. Upon the second reading the treaty was subject to debate and amendment in Committee of the Whole, all questions as to its ratification, amendment, or rejection being decided by a two-thirds vote. Each part of the committee's report was then to be submitted for the Senate's acceptance by a two-thirds vote, amendment again being in order. At the third reading, on a subsequent day, all that had been confirmed, 'reduced into the form of a ratification,' with or without amendments, was again to be submitted to debate and amendment, and a two-thirds vote was necessary to carry affirmation on every proposed amendment as well as on the final question to advise and consent to ratification.<sup>6</sup>

<sup>1</sup> For account of the two conferences between the President and this committee, and of the recommendations adopted, see p. 62.

<sup>2</sup> Pages 64; 583.                   <sup>3</sup> Rule XXXVI, par. 1.

<sup>4</sup> Cong. Rec., LIV, 1741-43.

<sup>5</sup> Ibid., LVIII, 2336.

<sup>6</sup> Senate *Executive Journal*, I, 465. These matters are now regulated by Rule XXXVII. It is to be observed that, although procedure upon bills or resolutions 'by the Senate as in Committee of the Whole' was eliminated by amendment of the rules, May 16, 1930, that procedure was still retained in the consideration of treaties.

### *Treaties Referred to the Committee on Foreign Relations*

One of the few significant changes made in the rules since 1801 is the provision that at the first reading a motion shall be in order to refer the treaty to a committee, and that when a treaty is reported from a committee at the second reading, any 'amendments reported by the committee shall be first acted upon.'

In the years before the establishment of standing committees, it soon became a sensible habit of the Senate, immediately upon receipt of a treaty from the President, to refer it to a committee. Through successive Congresses to a remarkable extent these treaty committees included a considerable number of the same Senators.<sup>1</sup> Since its establishment in 1816, the Committee on Foreign Relations has been one of the utmost importance. To it are referred every treaty and practically every resolution bearing upon the dealings between the United States and other nations. Its recommendations carry great weight. For a century its membership has included some of the best-trained minds in the Senate, and continuity of service has enabled them to bring to bear upon their problems a wealth of information and seasoned judgment.

### *The Two-Thirds Majority Required on Only Two Motions*

Another important change from the early rule is that whereby the constitutional majority of 'two-thirds of the Senators present' is required on two motions only — 'the final question to advise and consent to ratification in the form agreed to,' and the motion 'to postpone indefinitely.'<sup>2</sup> The rule of 1801 required a two-thirds majority upon every question that arose while the treaty was before the Senate. The change carries important consequences. By the narrowest of majorities — even by the casting vote of the Vice-President<sup>3</sup> — a radical amendment may be imposed upon a treaty, although the treaty as amended must then secure a two-thirds vote

<sup>1</sup> R. Hayden, *op. cit.*, 170–72, ch. VIII, 'The Genesis of the Senate Committee on Foreign Relations.'

<sup>2</sup> Rule XXXVII, sec. 1.

<sup>3</sup> It had been decided, after keen debate, Nov. 23, 1803, that in the case of a proposed amendment to the Constitution 'a bare majority is sufficient to amend a resolution that cannot be passed with less than two-thirds.' Plumer, *Memorandum*, 36; *Annals of Congress*, 83; Senate *Journal*, III, 314.

In September, 1919, three Democratic members of the Committee on Foreign Relations sent an urgent summons to Vice-President Marshall, who chanced to be out of the city. They wanted to be assured of his casting vote, in case there should be a tie on the Johnson amendment, to equalize British and American voting power in the League Assembly. Press dispatch, Sept. 20, 1919.

for its ratification. Attention was focused upon this point in 1919 as soon as reports came from Paris that the Covenant of a League of Nations was to be inextricably tied into the Treaty of Versailles. Three months before the treaty was actually laid before the Senate, a critic of the League plan, Borah, declared that this rule allowing the adoption of an amendment by a bare majority vote would give opponents a distinct advantage, as it would enable a majority to revise the League Covenant or to separate it from the Peace Treaty. In making a parliamentary ruling in the Senate on the day when the treaty with its load of fourteen reservations was to be voted upon, Vice-President Marshall referred to that 'part of the rule of the Senate touching treaties which suffers and permits all questions, except the final vote, to be decided by a majority vote, in derogation if not in violation of the Constitution of the United States.'<sup>1</sup>

#### THE RULE OF SECRECY AS TO TREATY DEBATES IN THE SENATE

The Constitution was framed before the days of 'open agreements, openly arrived at.' Repeatedly in the Convention's debates secrecy was stressed as essential in treaty-making, and this function was given to the President with the advice and consent of the Senate, because it was believed that secrecy might thus be secured, although it could not be hoped for, if the House were taken into the President's confidence.<sup>2</sup> It is pertinent to note that the Senate (96) of today is larger by half than the House (65) as provided by the Constitution for the First Congress. Of Senate secrecy Mr. Bryce said: 'Of course no momentous secret can be long kept, even by the committee, according to the proverb in the Elder Edda — "Tell one man thy secret, but not two; if three know, the world knows!"<sup>3</sup>'

As early as 1791 Jefferson records: 'The President had no confidence in the Secrecy of the Senate,' and experience was soon to prove his distrust well grounded.<sup>4</sup> When Jay's Treaty was submitted to the Senate, although the President had not suggested secrecy, it was at once ordered that the members be 'under an injunction of secrecy on the communications this day received from the President... until the further order of the Senate.'<sup>5</sup> They also

<sup>1</sup> Nov. 19, 1919, *Cong. Rec.*, LVIII, 8788.

<sup>2</sup> 'The necessity of secrecy in the case of treaties forbade reference of them to the whole legislature.' Roger Sherman, Sept. 7, 1787, Elliot, *Debates* (1845 ed.), V, 523.

<sup>3</sup> *The American Commonwealth* (1922 ed.), I, 108.

<sup>4</sup> *Writings* (Definitive ed.), I, 294–95; 305–09.

<sup>5</sup> *Senate Executive Journal*, I, 178.

ordered that thirty-three copies be printed under the seal of secrecy for the use of the Senate. Pressure from outside became very heavy. As Hamilton wrote to Oliver Wolcott, 'I find the non-publication of the treaty... is giving much scope to misrepresentation and misapprehension.'<sup>1</sup> After the treaty had been under consideration for over a fortnight, various proposals were made for removing the ban, and soon the injunction of secrecy was rescinded, but it was nevertheless enjoined upon the Senators not to authorize or allow any copy of the said communications or article thereof.<sup>2</sup> A few days later Senator Mason of Virginia sent his copy to the editor of the *Aurora*, in which a 'not very faithfully taken abstract' had already appeared.<sup>3</sup> Although there was much criticism of Mason for his dishonorable act, the Senate passed no formal censure upon him.

In transmitting to the Senate the instructions which had been given to the American envoys who negotiated the French Convention of 1800, President Adams requested that they be considered in strict confidence and promptly returned.<sup>4</sup> As a result the Senate adopted a standing rule imposing inviolable secrecy upon all confidential communications made to the Senate by the President, and providing that all treaties thereafter laid before the Senate should be kept secret until the Senate by resolution should take off the injunction.<sup>5</sup> For more than a century that rule remained practically unchanged.<sup>6</sup> Disclosure of any such secret or confidential proceedings of the Senate rendered a Senator liable to expulsion, and an officer to dismissal from the service of the Senate, and to punishment for contempt.<sup>7</sup>

<sup>1</sup> *Works*, X, 107.

<sup>2</sup> Wolcott wrote to his wife: 'They have determined not to countenance a publication, though they have reserved a right of conversing generally about it. Perhaps this will be found equivalent to a publication.' Quoted by Hayden, *op. cit.*, 90, n. 2. Senate *Executive Journal*, I, 191.

<sup>3</sup> Comment of John Marshall, *Life of Washington*, II, 362.

<sup>4</sup> Senate *Executive Journal*, I, 361.      <sup>5</sup> *Ibid.*

<sup>6</sup> Rule XXXVI, cl. 3. The Committee on Rules interpreted this injunction of secrecy as extending 'to each step in the consideration of treaties, including the fact of ratification,' which, they added, 'may be of the utmost importance and ought not to be removed except by order of the Senate, or until it has been made public by proclamation by the President.' March 21, 1885, Senate *Executive Journal*, 571.

<sup>7</sup> The occasion for formulating this rule was as follows: May 10, 1844, Benjamin Tappan, a Senator from Ohio, who had caused to be published in a New York paper the Treaty of Annexation of Texas, still under injunction of secrecy, was declared to have been 'guilty of a flagrant violation of the rules of the Senate and disregard of its authority,' but 'in consideration of the acknowledgments and apology tendered by him for his offense,' it was ordered that no further censure be inflicted on him. *Ibid.*, VI, 70-73.

Despite these stringent rules, the main provisions of treaties often leaked out soon after they were laid before the Senate, and attempts to place the blame usually proved futile. In 1846, it was declared on the floor of the Senate Chamber that treaties of great concern became known just as well as if considered in public. In 1848, a newspaper correspondent, who had sent a copy of the pending Mexican Treaty to the *New York Herald*, was summoned before the bar of the Senate. To various questions as to the source from which he had received a copy, he replied: 'I consider myself bound in honor not to answer.' The Senate thereupon passed a resolution declaring that he had 'committed a contempt against the authority of the Senate and that he remain in the custody of the Sergeant-at-Arms until he answer the said interrogatories or until further order of the Senate.' A month later he was released, 'he being reported to be seriously indisposed.'<sup>1</sup> February 24, 1854, the President of the Senate was directed to address a note on behalf of the Senate to each member, asking him if he could give any information as to disclosures in regard to the treaty with Mexico and the debates on a nomination for consul at London. The replies were reported to the Senate in executive session a week later,<sup>2</sup> but yielded no definite information as to the source from which the correspondent had received his material in regard to the matters in question.<sup>3</sup>

At various times treaties have been published in this country from copies that came from abroad before the seal of secrecy had been removed by the Senate. Thus the Bayard-Chamberlain Treaty, 1888, was published in Canada while a long debate was under way in the Senate on a motion to remove the injunction of secrecy.<sup>4</sup> In 1899, the Senate itself removed the injunction from the treaty with Spain, although for weeks thereafter the debates upon it were con-

<sup>1</sup> Senate *Executive Journal*, VII, 404.

<sup>2</sup> *Ibid.*, IX, 249.

<sup>3</sup> *Ibid.*, 272-73.

In Senate debate in 1831, Mr. Forsyth had said: 'It was soon found, as the Government moved on, that if a desire was felt that any subject should be bruited about in every corner of the United States, should become a topic of universal conversation, nothing more was necessary than to close the doors of the Senate Chamber, and make it the object of secret, confidential deliberation.' (*Cong. Debates*, VII, 294.) The *New York Times*, *à propos* of the publication of some diplomatic correspondence, commented on 'the absurdity of keeping up such a hollow sham any longer. It simply allows certain newspapers to trade on the honor of certain senators.' (C. H. Kerr, *op. cit.*, 101-03.) In 1890 (Feb. 19) the *New York Tribune* published the details of the pending treaty with Great Britain, and in the same issue urged that secret sessions be done away with. The Senate's effort to learn the sources of the disclosures, led to no results. *Senate Executive Journal*, XXVII, 475-77.

<sup>4</sup> C. H. Butler, *op. cit.*, II, 378.

tinued in executive session. Several weeks before the Treaty of Versailles was formally laid before the Senate, an unofficial text of it had been printed in the *Congressional Record*.<sup>1</sup> Sometimes after the Senate has acted upon a treaty, the injunction is removed as to the debates. It was in this way that Sumner's speeches on the Alaska cession (1867), and the claims against Great Britain (1869), were published.<sup>2</sup>

To what extent might a Senator in open session reveal what has taken place in executive session in regard to a treaty? Said Senator Spooner:

I have a right, of course, to say that the President negotiated a treaty or a protocol for a treaty with Santo Domingo, and sent it to the Senate. I have no right to say, Mr. President, what the attitude of the Foreign Relations Committee of the Senate was toward it, what amendments, if any, they proposed to it, or how far, if at all, the debates of the Senate were in non-approval of one or more of the positions taken by the President in urging its ratification. All that I have no right to touch upon in the open session of the Senate, the arguments by which such a treaty was supported or opposed are as if never uttered, as I speak here today.<sup>3</sup>

#### CONSIDERATION OF TREATIES IN OPEN EXECUTIVE SESSIONS

Proposals for the consideration of treaties in open session were made as early as 1869. It has been urged that it would allay suspicion and apprehension if the facts as to a treaty and the debate over it — certain to reach the public in some form — should be authoritatively published; that it would lead Senators to discuss treaties with a higher sense of responsibility, with less temptation to yield to partisanship or corruption.<sup>4</sup> A less exalted motive — a belief that publicity might help certain Senators in approaching campaigns for re-election — is said to have led to the first Senate vote that a treaty be considered in open executive session. The Fisheries Treaty with Great Britain was

<sup>1</sup> A large part of the text of the treaty was printed in the *Record* of June 9, although the President did not lay it before the Senate officially until July 10. It was declared in the Senate (June 5) that four copies of the treaty were known to be in New York, and that apparently 'the only place where it is not allowed to come is the United States Senate.'

<sup>2</sup> J. W. Foster, *op. cit.*, 279.

<sup>3</sup> *Cong. Rec.*, XL, 1423, Jan. 23, 1906.

<sup>4</sup> In debate Brandegee once made the point that too much plain speech might give offense to foreign countries. 'What are these delicate questions,' retorted Borah, 'which may offend foreign powers? These delicate questions are too often questions of dubious righteousness.' Walter Lippmann commented: 'Only a man who has risen by appealing to audiences rather than by making executive decisions would, I think, have said that.' (*Men of Destiny*, 144.)

defeated in 1888 after many weeks of animated debate.<sup>1</sup> The arbitration conventions with Great Britain and France were also debated in open executive sessions in 1911.

December 4, 1918, the day President Wilson started on his first mission to the Peace Conference, Borah introduced a resolution requiring that the Peace Treaty be published as soon as it should be laid before the Senate, 'and that the consideration of the same and all discussions relative thereto shall be in open session of the Senate.'<sup>2</sup> The first action of the Senate after President Wilson had left the Chamber, July 10, 1919, was to order the removal of secrecy from the treaty he had just presented.<sup>3</sup> It was immediately printed, and was debated and voted upon in open session. Like publicity was given to

<sup>1</sup> Miss C. H. Kerr, *op. cit.*, 136. By vote, yeas 27, nays 30.

<sup>2</sup> *Cong. Rec.*, LXII, 71. It was laid on the table at the mover's request.

<sup>3</sup> July 10, 1919, *Cong. Rec.*, 2339.

Viscount Grey, who spent several weeks in Washington as special Ambassador of the British Government while the Peace Treaty was before the Senate, attended various sessions, and is reported to have said that the debate upon that treaty was upon the plane of the best debates in Parliament. That high praise was well merited by many who took part in the debate. But, on the other hand, not a few Senators welcomed the opportunity, even upon such a momentous issue, to talk to the galleries or to address their constituents through the press and the *Record*. During the debate on the proposed reservations, Senator Thomas said: 'If any member of this body still holds the opinion that open executive sessions are wise or even politic, I trust the spectacle which the Senate has today presented to the people of the United States will serve to disillusion him. And if anyone longer imagines that any issue submitted to this body for determination, however great, will escape the contamination of a sordid and humiliating partisanship, let him read the *Congressional Record* and be undeceived.' March 18, 1920, *ibid.*, 4530.

On that day — the very last before the final vote on the Treaty — Senators found the occasion opportune to debate Reservation 15, which had taken this form: 'In consenting to ratification of the treaty with Germany the United States adheres to the resolution of sympathy with the aspirations of the Irish people for a government of their own choice, adopted by the Senate, June 6, 1919, and declares that when self-government is attained by Ireland, a consummation, it is hoped, is at hand, it should be admitted as a member of the League of Nations.'

Senator Sterling protested against the adoption of this reservation. He declared that the other fourteen had all been adopted in Committee of the Whole. 'Now, here in the last hours of the discussion, is an attempt, connived at, I think, by the leader upon the other side, for the purpose of defeating the treaty, Americanized as it is.' He insisted: 'It is absolutely foreign to any provision, to any stipulation, or to any agreement of the treaty or the covenant.' He pointed out the glaring inconsistency between the Senate's adopting reservation after reservation to prevent the League of Nation's passing upon special interests or 'doctrines' of the United States, and then proposing a final reservation relating to the most hotly contested issue in British politics. Recognizing that the reservation was sure to pass, although he believed it should be defeated, he merely moved that it be amended by striking out the most glaringly inappropriate and awkward phrase — 'a consummation, it is hoped, is at hand.' His amendment was promptly tabled by a heavy vote. Thereupon Reservation 15 was adopted by a vote of 45 to 38, 13 not voting. Instances of action more incongruous or meddlesome it would be hard to find in the entire record of the Senate's amendments and reservations upon treaties. *Ibid.*, 4531.

the proceedings upon the peace treaties with Germany, Austria, and Hungary, and to the treaties that were negotiated at the Washington Conference of 1921.

In the next few years the pressure for the public consideration, not only of treaties but of nominations, steadily increased. Finally, June 18, 1929, by a vote of 69 to 5, the Senate so amended its rule as to provide that thereafter all Senate business, including the consideration of treaties and nominations, shall be transacted in open session unless the Senate in closed session decides, by a majority vote, that a particular nomination, treaty, or other matter shall be considered in closed executive session. The amended rule further provides that any Senator may make public how he voted in closed executive session.<sup>1</sup>

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#### THE SENATE AND THE TERMINATION OF TREATIES

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The Senate has jealously insisted upon its constitutional right to share in the making of treaties; but it has not been disposed to assert any pre-eminent part in their unmaking, although at least one President has seemed to recognize such a special right. President Hayes declared:

As the power of modifying an existing treaty, whether by adding to or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress.<sup>2</sup>

Denunciation of treaties has usually been by joint resolution, originating sometimes in the House, sometimes in the Senate. An interesting exception occurred in 1855. In response to President Pierce's declaration that the required notice for the termination of the existing treaty of commerce and navigation with Denmark should be given, in accordance with a specific provision of the treaty as to the procedure by which it might be terminated, the Senate by unanimous vote passed a resolution authorizing such notice. Sumner took excep-

<sup>1</sup> Amendment of Rule XXXVIII. The five who voted against this change were Blease, Couzens, Patterson, Smith, and Waterman, a strangely assorted group. *Cong. Rec.*, 3055.

<sup>2</sup> *Messages*, VII, 519.

tion to this method, insisting that notice authorized by the Senate alone would thus virtually effect the repeal of a 'law of the land,' which should be done only by Congress. But the Committee on Foreign Relations in a full report sustained the Senate's action:

As to this convention, and all others of like character where no legislation has been necessary to carry them into effect, the Committee is clear in the opinion that it is competent for the President and Senate, acting together, to terminate it in the manner prescribed by the 11th article without aid or intervention of legislation by Congress.<sup>1</sup>

In this instance, notice of the termination of the treaty was thus given by the 'treaty-making power' alone. Resolutions of denunciation have often, however, been adopted by Congress,<sup>2</sup> and Presidents have usually complied with the action called for by such resolutions.<sup>3</sup>

Has the President, alone, the power to denounce a treaty? Willoughby declares:

Though the Senate participates in the ratification of treaties, the President has the authority, without asking for senatorial advice and consent, to denounce an existing treaty, and to declare it no longer binding upon the United States. In important cases, however, he would undoubtedly seek senatorial approval before taking action. But whether or not this approval be sought, the courts hold themselves bound by the denunciation, the existence or non-existence of the treaty being a political question the decision upon which by the political departments of the government are binding upon the judicial departments.<sup>4</sup>

Wright cites the analogy of the President's exercising the power of removal without the consent of the Senate, but says that his power to denounce a treaty has seldom been practiced and has often been doubted.<sup>5</sup> In November, 1919, when the question was raised in the Senate, whether the President could give notice of the denunciation of a treaty without authorization by Congress, Walsh (Montana) replied: 'I think not; certainly not. I cannot believe that anybody

<sup>1</sup> *Compilation of Reports of Senate Committee on Foreign Relations*, VIII, 108; *Senate Executive Journal*, IX, 431. May 17, 1920, President Wilson sought the Senate's consent to the denunciation of the International Sanitary Convention of December 3, 1903. More than a year later, consent was given by the resolution of May 26, 1921. Malloy, *op. cit.*, 2879.

<sup>2</sup> It was insisted in the Senate that this should be by *joint* resolution. Nov. 7, 1919, *Cong. Rec.*, 8074.

<sup>3</sup> Quincy Wright (*op. cit.*, 260) notes exception.

<sup>4</sup> W. W. Willoughby, *Constitutional Law of the United States*, sec. 223, p. 518. He cites *Terlinden v. Ames*, 184 U.S. 270.

<sup>5</sup> Quincy Wright, *op. cit.*, 260.

could entertain serious doubts as to that.<sup>1</sup> President Taft, however, did that very thing. When it seemed certain that the Senate would pass a House joint resolution drawn in terms sure to give offense to Russia, denouncing the Russian treaty of commerce of 1832, the President, thinking that if the treaty had to be abrogated, it ought — with a view to future negotiations — to be done as politely as possible, took the step of annulling the treaty himself. He at once announced this action to the Senate, which substituted a resolution, approving his action, for the pending House resolution. The House was thus induced to approve what the President had done.<sup>2</sup>

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### THE SENATE AND THE CONTROL OF FOREIGN RELATIONS APART FROM TREATY-MAKING

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Although in the nature of the case the President must be the organ of communication with foreign governments,<sup>3</sup> Congress or the Senate

<sup>1</sup> In the Senate, Nov. 8, 1919, Walsh (Mont.): 'The Senator from Wisconsin (Lenroot) has called attention to a statement in Willoughby which seems to indicate that the President of the United States alone can abrogate a treaty; but I should want to examine the question with great care before I could accept any such doctrine.' *Cong. Rec.*, 8131.

In response to resolutions adopted by the Senate (Dec. 5, 1918, and Feb. 3, 1919) there was prepared an elaborate letter from the Department of State (March 27, 1919): 'Information Concerning Abrogation of Treaties.' It contains memoranda as to treaties with 17 countries, where abrogation had been announced or proposed; and abrogation provisions in treaties with 25 countries. 66th Cong., 1st sess., S. Doc. 2.

<sup>2</sup> The chronology of the steps taken in this matter is significant. A House joint resolution, providing for the termination of this treaty, passed the House, Dec. 13, 1911, and was at once sent to the Senate. While it was in the hands of the Committee on Foreign Relations, President Taft transmitted to the Imperial Russian Government, Dec. 17, 'official notification on behalf of this Government of intention to terminate the operation of the treaty,' and at once sent a special message to the Senate, saying: 'I now communicate this action to the Senate, as a part of the treaty-making power of this Government, with a view to its ratification and approval.' Lodge immediately reported from the Committee on Foreign Relations (which had already dealt with this message before it had been presented to the Senate!) a resolution as a substitute for the pending House joint resolution: 'Resolved:... That the notice thus given by the President of the United States to the Government of the Empire of Russia to terminate said treaty in accordance with the terms of the treaty is hereby adopted and ratified.' This was adopted by the Senate, Dec. 19; the following day, the House concurred in this action. President Taft discussed this action in *Our Chief Executive*, 116–17. See also Quincy Wright, *op. cit.*, 258–62; J. W. Foster, *op. cit.*, 295–311.

<sup>3</sup> See 'Minutes of a Conversation,' July 10, 1793, between Jefferson, Secretary of State, and Citizen Genêt, envoy of the first French Republic. Jefferson returned to

has often shown a disposition to share his responsibility or to inform him as to what in their belief should be done, whether in recognizing a new state<sup>1</sup> or changes in the government of an established state, or a foreign power's claims to the status of belligerency. Of course, it is entirely within the President's discretion whether he will accept the advice and comply with the request conveyed by such resolutions, or whether he will reject or merely ignore their encouragement or warning. In some instances, Presidents have found such resolutions strengthened their hands; in others the resolutions have proved seriously embarrassing — as it was obviously intended that they should.

In 1836, Jackson had received separate resolutions from both the Senate and the House favoring the acknowledgment of the independence of Texas by the United States; the preamble of the House resolutions intimated that the expediency of recognizing the independence of Texas should be left to the decision of Congress. In his message December 21, 1838, the President said:

In this view, on the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express my opinion as to the strict Constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject.<sup>2</sup>

In 1897, under strong pressure for the recognition of Cuban independence, the Senate's Committee on Foreign Relations, after a thorough investigation of the subject, reported that 'the recognition of the belligerency of a foreign power, technically speaking, is distinctly a diplomatic matter.'<sup>3</sup> It enumerated the steps

him a consul's commission, which had been addressed to 'The Congress of the United States,' and declared that the President would issue no exequatur to a consul except upon a commission correctly addressed. E. S. Corwin, *The President's Control of Foreign Relations*, 46–47. J. B. Moore, *Digest of International Law*, IV, 680–81.

<sup>1</sup> See J. L. Paxson, *The Independence of the South American Republics; A Study in Recognition and Foreign Policy*; especially 139–43, Clay's efforts, in the House, to force the President to recognize these Republics.

<sup>2</sup> *Messages*, III, 266–67; Hinds, *House Precedents*, sec. 1544.

<sup>3</sup> 'Power to Recognize the Independence of a New Foreign State,' a report from the Committee on Foreign Relations, presented Jan. 11, 1897, by Senator Hale, when the following resolutions were before the Senate: (1) 'That the independence of the Republic of Cuba be, and the same is hereby, acknowledged by the United States of America,' and (2) 'That the United States will use its friendly offices with the Government of Spain to bring to a close the war between Spain and the Republic of Cuba.' The memorandum drew these conclusions upon the pending question of recognition: 'The President and the Senate are thus granted [by the Constitution] the power to make a treaty with the Republic of Cuba and *a fortiori* to recognize its existence. So, the President and the Senate are granted the power to send a minister to Cuba, and *a fortiori* to recognize its existence, and the President alone is granted the power to receive a minister from the Republic of Cuba and *a fortiori* to recognize its existence.'

taken by the Executive in the usual and proper course, concluding:

The Senate can take no part in it at all until the President has sent in a nomination of the minister to be sent to the government. Nor can the legislative branch of the government hold any communications with foreign powers. The Executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties.

Although the committee had declared that 'Congress cannot help them [the Cuban insurgents] legitimately by mere declarations, or by attempts to engage in diplomatic negotiations,' a few months later a minority of the committee favored 'the immediate recognition of the Republic of Cuba... as a free, independent and sovereign power.'<sup>1</sup> The first resolution of the measure which authorized our entrance into the war to end Spanish rule in Cuba declared that its people 'are and of right ought to be free and independent.'<sup>2</sup> Senator Spooner, the champion of executive independence in the control of foreign relations, criticized this declaration as 'a usurpation of an Executive function and an attempt to make a precedent which ought not... to be established.'<sup>3</sup> Its sponsors considered it not trenching upon diplomatic procedure, but an incident to the then inevitable declaration of war.<sup>4</sup>

The presence in its membership of many men who have served long on the Committee on Foreign Relations and have seen diplomatic problems at close range has at times made the Senate more cool-headed than the House in its declarations as to matters of foreign policy. While the Civil War was in progress there was universal resentment at the French interference in Mexico. In the Senate, resolutions were repeatedly introduced condemning French intervention. January 11, 1864, the McDougall resolution asserted that it was the duty of the United States to declare war against France if the French troops were not withdrawn by the middle of the following March.<sup>5</sup> All resolutions of such tenor were either tabled or referred to the Committee on Foreign Relations, where they remained unreported under the 'judicious chairmanship' of Charles Sumner, who regarded them as untimely and sure to give aid and

The President and Senate are general managers of our affairs with other governments, and part of such management is to recognize or deal with *new* governments, and so are empowered to deal with and recognize the Republic of Cuba.' 54th Cong., 2d sess., S. Doc. 56, p. 18; Hinds, *House Precedents*, sec. 1540.

<sup>1</sup> April 13, 1898, *Cong. Rec.*, XXXI, 3776.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Cong. Rec.*, XXXI, Appendix, 290-91.

<sup>4</sup> *Ibid.*, 3984; Appendix, 288.

<sup>5</sup> *Cong. Globe*, XXXIV, 145; 1227.

comfort to the Confederates.<sup>1</sup> In the House no such restraint was shown. Under the leadership of Henry Winter Davis, Chairman of the Committee on Foreign Affairs, by unanimous vote, April 4, 1864, the House adopted a resolution declaring:

It does not accord with the policy of the United States to acknowledge a monarchical government erected on the ruins of any republican government in America, under the auspices of any European power.<sup>2</sup>

Secretary Seward instructed our Minister in Paris to inform the Government of France that 'the decision of such questions of policy constitutionally belongs, not to the House of Representatives nor even to Congress, but to the President of the United States.'<sup>3</sup> When this dispatch became known to the House, after heated debate and by an almost unanimous vote a resolution was passed:

That Congress has the constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States as well as the recognizing of new powers as in other matters; and it is the constitutional duty of the President to respect that policy . . . and such proposition while pending and undetermined is not a fit topic of diplomatic explanation with any foreign power.<sup>4</sup>

Similar resolutions in the Senate never emerged from the lethal chamber of the Committee on Foreign Relations.

One of the most interesting illustrations of the contrasts between the 'sense' of the House and of the Senate is found in the resolutions as to Hawaii. After long debate the House, by a vote of 173 to 0 — 174 not voting! — denounced 'the use of American arms in setting up the Provisional Government.' President Cleveland had indicated his belief that the Queen should be restored to the throne. In the Senate a resolution was introduced, declaring:

It is the sense of the Senate of the United States that the Government of the United States should not use force for the purpose of restoring to the throne the deposed Queen of the Sandwich Islands, or for the purpose of destroying the existing Government, it having been duly recognized.

<sup>1</sup> Nicolay and Hay, *Abraham Lincoln*, VII, 407; E. L. Pierce, *Memoir of Charles Sumner*, VI, 118.

<sup>2</sup> Cong. *Globe*, XXXIV, 1408; Hinds, *House Precedents*, sec. 1539.

<sup>3</sup> Dispatch to Dayton, April 7, 1864, 39th Cong., 1st sess., S. Exec. Doc. 6, p. 5; J. H. Latané, *The United States and Latin America*, ch. V, 'French Intervention in Mexico'; F. Bancroft, 'The French in Mexico and the Monroe Doctrine,' *Political Science Quarterly* (March, 1896), 30-43.

<sup>4</sup> Cong. *Globe*, XXXIV, 3309. Adopted by heavy votes, Dec. 19, 1864. *Ibid.*, XXXV, 36. For Grant's jealous guarding of executive prerogative, see veto message of Jan. 26, 1877 (*Messages*, VII, 430-32); Corwin, *The President's Control of Foreign Relations*, 43-44; Hinds, *House Precedents*, sec. 1556.

The resolution, however, which after debate was adopted by a vote of 55 to 0 — 30 not voting — took the form:

That of right it belongs wholly to the people of the Hawaiian Islands to establish and maintain their own form of Government and domestic polity; that the United States ought to in no wise interfere therewith, and that any intervention in the political affairs of these islands by any other government will be regarded as an act unfriendly to the United States.<sup>1</sup>

From time to time resolutions for the recognition of various new foreign states have been introduced in the Senate. May 15, 1922, Borah introduced a resolution: 'That the Senate of the United States favor the recognition of the present Soviet Government of Russia.'<sup>2</sup> At his request it was laid on the table. In December, 1923, President Coolidge's message seemed to indicate a more friendly attitude on the part of the Administration, and Borah introduced a new resolution favoring such recognition. From Moscow came tentative inquiries as to the terms upon which diplomatic and commercial relations between Russia and the United States might be resumed. These called forth a chilling response from the Secretary of State, asserting that recognition was impossible so long as the Russian Government showed no disposition to assume responsibility for Russia's debts to the United States and so long as it continued to conduct an active propaganda for world revolution, and specifically for the overthrow of the Government of the United States.<sup>3</sup> The

<sup>1</sup> *Cong. Rec.*, XXVI, 5500.

<sup>2</sup> *Ibid.*, LXII, 6945.

<sup>3</sup> Negotiations carried on in Washington in November, 1935, between Secretary Hull and the special representative of the Moscow Government resulted in the resumption of diplomatic relations. The result proved highly disappointing.

Aug. 25, 1935, the Secretary of State, Cordell Hull, through the American Ambassador at Moscow, lodged a most emphatic protest against the flagrant violation of the pledge with respect to non-interference in the internal affairs of the United States, given Nov. 16, 1933, by the Government of the Union of Soviet Socialist Republics, on the basis of which the United States had resumed diplomatic relations with the Russian Government. The Secretary used almost the identical phrase which had given offense in the Japanese Ambassador's letter to Secretary of State Hughes in regard to the 1924 immigration bill. He said:

The Government of the United States would be lacking in candor if it failed to state frankly that it anticipates the *most serious consequences*, if the Government of the United Soviet Socialist Republics is unwilling or unable to take appropriate measures to prevent further acts in disregard of the solemn pledge given by it to the Government of the United States.

The basis of Secretary Hull's protest was that at the recent meeting of the Third International at Moscow the Russian Government 'had looked the other way' while violent language about the United States was used, and while plans and plots for open or secret interference here were being put forward and approved by Russian citizens.

Promptly came the reply from the Russian Acting Commissar for Foreign Affairs, in which he blandly denied any responsibility on the part of his Government for the actions of the Communist International, adding: 'I cannot accept your protest, and

contrast in tone between the message of the President and the utterance of the Secretary of State started a hot debate in the Senate, and a committee was appointed to investigate charges that the Russian Government was responsible for propaganda in this country hostile to the Government of the United States.<sup>1</sup> The situation was unique: a committee, chosen by the Senate to investigate one of the principal reasons assigned by the Secretary of State why the United States should not recognize Russia, began its series of public hearings by summoning the Secretary, who responded by sending members of his staff to lay before the committee such documents and to answer such questions as in his opinion the public interest permitted.

One of the functions assigned to the President and exercised by him with least challenge has been the receiving of ambassadors and public ministers. For the most part this has been regarded as a ceremonial affair, but that it is something more is evident by the refusal of President Wilson to recognize Huerta, and his later announcement of an intention to recognize no government grounded on acts of violence.<sup>2</sup> But Senate action may influence even this executive function. In 1922, Boris Bakhmeteff was subpoenaed to appear before the Senate Committee on Education and Labor. He turned the summons over to the State Department and from Secretary Hughes came a communication, April 18, 1922, to the effect that Bakhmeteff was

officially received by the President, July 5, 1917, as Ambassador Extraordinary and Plenipotentiary of Russia and since that time this Government has recognized him in that capacity and has recognized no other Russian ambassador. . . . An ambassador is not required to respond to process.<sup>3</sup>

In a speech in the Senate Borah drove home the question: 'Whom does this "Ambassador" represent?' Coming to this country in the early months after the deposition of the Czar, apparently he had never been accredited in legal form; yet he had secured loans amount-

am obliged to decline it.' Secretary Hull made no reply, but issued a statement that there had been a clear-cut disregard and disavowal of the pledge by the Soviet Government, and that future relations between the United States and the Soviet Union will depend on its strict adherence to its non-interference pledge.

<sup>1</sup> *Cong. Rec.*, LXV, 98; 462-63; 573.

<sup>2</sup> E. S. Corwin (*op. cit.*, 83) comments: 'He has since shown ample prudence in applying this policy, as witness his recognition of a revolutionary government in Peru, of Carranza, and of the new Republic of Russia. Still, the statement of policy remains, and its possibilities are palpable.'

<sup>3</sup> *Cong. Rec.*, LXII, 5644; 6435.

ing to approximately \$187,000,000 for Russia, ostensibly to be expended in the United States for war supplies, but no evidence was advanced that a balance of some \$78,000,000 had been thus expended, and he had continued to occupy the Russian Embassy for years after the Government of Russia which had sent him here had been overthrown and supplanted by an organization which was on most unfriendly terms with the American Government.<sup>1</sup> There can be no doubt that the bringing out of these facts in the Senate led to the prompt disappearance from the Russian Embassy of this 'Ambassador' of a non-existent government.

That the appointment of ambassadors, other public ministers, and consuls must be by the advice and consent of the Senate gives to that body a considerable degree of control over our relations with foreign nations. Among the most notable controversies between the Senate and the President over the exercise of this power have been those occasioned by (1) Madison's recess appointments of the commissioners who negotiated the Treaty of Ghent; (2) John Quincy Adams's nomination of three 'envoys extraordinary and ministers plenipotentiary to the Assembly of American Nations at Panama'; and (3) Jackson's failure to send to the Senate for confirmation the names of three men he had sent on a special mission to Turkey.<sup>2</sup>

At the beginning President Washington showed caution in submitting his very first diplomatic nomination, that of William Short to 'take charge of our affairs' at the Court of France during the absence of the Minister. In the Senate the Vice-President raised the question what rank the appointee was to hold. The Senate showed more interest in the method of voting, and dodged this other question by a resolution 'declaring our advice and consent in favor of Mr. Short.'<sup>3</sup> To resolve his own doubts before another such dilemma should arise, Washington called upon his Secretary of State for an opinion whether the Senate had a right to 'negative the grade the President might think it expedient to use as well as the person to be appointed.' Jefferson replied at length, setting forth his grounds for believing that the Senate had no right to 'negative the grade,' but could only 'see that no unfit person be employed.'<sup>4</sup> In the first session of the Second Congress, however, for some time the Senate held up the nominations of ministers plenipotentiary at London and Paris and of a minister at The Hague, while they seriously debated whether

<sup>1</sup> *Cong. Rec.*, LXII, 6435.

<sup>2</sup> Hinds, *House Precedents*, sec. 1546; *infra*, 772, 774.

<sup>3</sup> Maclay, *Journal*, 81; *Senate Executive Journal*, I, 7.

<sup>4</sup> Page 57.

the interests of the United States called for the appointments of representatives of these grades for permanent service at foreign ports. Finally, persuaded at that time these particular appointments were desirable, they gave their consent to each. For many years there seems to have been no later instance of the Senate's raising question as to its special right to a part in fixing the grade of diplomatic and consular representatives, a matter left to the Executive until 1855, but which in more recent years has been largely governed by Congress.<sup>1</sup>

A foreign war is ordinarily terminated by a treaty of peace and amity, in the making of which the Senate has its constitutional share. In the turmoil which followed the Senate's rejection of the Treaty of Versailles, there was renewed a demand that the war be ended by a 'declaration of peace.' 'What Congress can pass, it can repeal,' was the slogan. Although the Federal Convention had definitely voted down a proposal that Congress have power to 'make peace,' it was insisted that its right to declare peace was implied in its power to declare war.<sup>2</sup> The first resolution for this purpose originated in the House, was amended in the Senate, and, after concurrence, went to President Wilson, who vetoed it on the ground that it did 'not seek to accomplish any of those objects for which the United States had entered the war.'<sup>3</sup> But when the Knox resolution was introduced from the Senate's Committee on Foreign Relations, with a former Secretary of State as its sponsor, it was passed by both Houses and signed by President Harding.<sup>4</sup> Although such a resolution might end the war as far as domestic law was concerned, there was need of the formal treaties incorporating the enemy countries' acceptance of these resolutions, to 'put aside the last remnant of war relationship.'<sup>5</sup>

Perhaps the Senate's most independent action in the way of declaring national policy was occasioned by the Magdalena Bay incident.

<sup>1</sup> Washington originally held the view that this was a matter in which the Senate might properly have a share. In his memorandum of the 'sentiments' which he put before the committee of the Senate, he wrote: 'Oral communications may be proper, also, for discussing the propriety of sending representatives to foreign states, and ascertaining the grade or character, in which they are to appear.' *Writings*, X, 484-86; Quincy Wright, *op. cit.*, 324-25; Mathews, *op. cit.*, 318-29.

<sup>2</sup> C. A. Berdahl, *War Powers of the Executive in the United States* (1921), especially ch. XIII; 'Power of Terminating War in the United States,' 223-31; E. S. Corwin, 'The Power of Congress to Declare Peace,' *Michigan Law Review* (May, 1920), 669-75.

<sup>3</sup> May 27, 1920 (p. 703); *Cong. Rec.*, LIX, 7747.

<sup>4</sup> Senate vote, 56 to 4.

<sup>5</sup> Senator Lodge declared that failure to ratify the formal peace treaties would 'leave us where we are today — in a technical state of war with Germany, Austria, and Hungary.' *Cong. Rec.*, LXI, 6548; Quincy Wright, *op. cit.*, 292.

Senator Lodge introduced a resolution, with the explanation that investigation of the reputed attempt of owners of land about Magdalena Bay in Lower California to demonstrate its national importance to a foreign government, had made it seem to the Committee on Foreign Relations 'an appropriate occasion for an expression of the view of the Senate of the United States.' The resolution declared:

That when any harbor or other place in the American Continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes.<sup>1</sup>

This resolution was adopted August 2, 1912, by vote of 51 to 4.

In repeated instances the Senate has attempted by resolutions to control our relations with Mexico. Thus, in January, 1863, the Senate adopted a resolution requesting the President to communicate to the Senate any correspondence between our Government and the Mexican Minister at Washington relating to the exporting from the United States of articles contraband of war for use of the French army invading Mexico, and as to any order which might have been

<sup>1</sup> S. Res. 371, *Cong. Rec.*, XLVIII, 10045-47; Quincy Wright, *op. cit.*, 381-82.

As a Senate resolution this did not have to come before the President for his signature. (Mathews, *op. cit.*, 16.) For other Senate resolutions relating to the Monroe Doctrine, see reservations placed upon the conventions concluded at the Second Hague Conference and at the Algeciras Conference. (Malloy, *op. cit.*, 2041 and 2183.) In 1858, the Senate had passed a resolution declaring that American vessels on the high seas in time of peace were not subject to search. (Moore, *Digest of International Law*, II, 946.) See also Senate resolution as to Ireland, June 6, 1919, and the proposed fifteenth reservation to the Treaty of Versailles, passed by Senate, March 18, 1920.

*Neutrality Resolutions.* During the 74th Congress the outbreak of the war between Italy and Ethiopia, with the possibility of widespread European embroilments, led to anxious consideration of the United States' neutrality policy. Wishing to have a free hand to deal with the situation as it might develop, the Administration in the early months made no formal recommendations to Congress upon neutrality legislation. Two recommendations from the Senate Munitions Investigation Committee were favorably reported by the Committee on Foreign Relations, but were withdrawn at the instance of Secretary Hull. But a few days before the end of the session pressure from the Munitions Committee, with threat of delaying adjournment by filibustering, forced action. The Chairman of the Committee on Foreign Relations reported a neutrality resolution, in the preparation of which the State Department had assisted. Its provisions would have made permanent revision in the American neutrality laws, but in the House its embargo provisions were made effective only until March 1, 1936. In the next session of Congress this resolution was somewhat strengthened, and made effective till May 1, 1937. For discussion of U.S. neutrality policy, see S. F. Bemis, *op. cit.*, 808-09.

issued to prevent the Mexican Government from availing itself of opportunities to procure such articles from this country.<sup>1</sup>

Two months later — the French Emperor having offered to mediate between the Governments of the United States and of the Confederate States — from the Committee on Foreign Relations Sumner introduced an elaborate concurrent resolution declaring that even if tenders of arbitration should be made with friendly intent,

Congress will be obliged to look upon any further attempt in the same direction as an unfriendly act which it earnestly deprecates.

Several Senators earnestly opposed the proposed action, insisting that any attempt to restore peace ought not to be denounced in advance; that the Senate had not in its possession the complete correspondence which occasioned the introduction of the resolution; and that its adoption would be an impropriety in trenching upon the President's control of foreign relations. To this Sumner replied that the Secretary of State had authorized the statement that he heartily approved of the resolution, and was specially interested in its adoption. The resolution was agreed to by the Senate by a vote of six to one.<sup>2</sup>

In recent years the principal ground of controversy between the United States and Mexico has been the question of protection to the lives and property of United States citizens in Mexico — most particularly, assurance that concessions to our citizens of oil and mining rights in Mexico would not be confiscated under a strict and retroactive interpretation of the Mexican Constitution of 1917. Critics of the State Department, in the Senate and elsewhere, protested against our being brought to the brink of war over the debatable property rights of United States nationals and corporations that had deliberately embarked upon most risky enterprises in Mexico.

In the middle of January, 1927, when the Sixty-Ninth Congress was within six weeks of its expiration, in a single week there were launched in the Senate four resolutions evincing strong senatorial disapproval of the trend in our relations with Mexico. The minority leader sponsored a resolution declaring it to be 'consistent with the honor and best interests of the United States, and promotive of international peace and good will to submit to arbitration or to some impartial tribunal empowered to apply the principles of international law' the pending controversy between Mexico and the United States

<sup>1</sup> Jan. 13, 1863, *Cong. Globe*, 292.

<sup>2</sup> March 3, 1863. The vote stood 31 to 5 — the dissenters being Carlile, Latham, Powell, Saulsbury, and Wall.

as to the petroleum and alien land-ownership statutes; and that in good will and friendliness efforts should be made and persisted in to bring it about that the two Governments be committed to the policy of abiding by and executing awards or judgments as to such property rights rendered in consequence of such arrangements to arbitrate or to litigate.<sup>1</sup> The Secretary of State at once declared that arbitration had been under consideration for some time, and that he would welcome an expression of opinion by the Senate.<sup>2</sup> While the resolution was pending, however, President Coolidge, though acknowledging that its passage would 'clarify' the situation at home and abroad, reiterated with emphasis that the question between Mexico and the United States resolved itself into one of whether the property rights of American nationals should be confiscated without compensation.<sup>3</sup> In the Senate the resolution was reported favorably from the Committee on Foreign Relations; its sponsor declared:

The only thing involved in this matter is property, and if we cannot arbitrate that question, there is no use to talk longer about arbitration.<sup>4</sup>

The resolution was agreed to, by a unanimous vote.<sup>5</sup>

Mindful of the near approach of the end of the Congress, and of the fact that in a previous controversy with Mexico President Polk's ordering the United States troops into the disputed territory had occasioned a declaration of war with Mexico, Frazier introduced a resolution:

That it is the sense of the Senate that the President of the United States should not exercise the powers of the Commander-in-Chief of the Army and Navy of the United States to send any of the armed forces of the Nation into Mexico, or to mobilize troops on the Mexican border, or to assemble fighting units of the Navy in waters adjacent to Mexico, while the Congress of the United States is not in session, but that if and when he contemplates such action, he shall immediately summon Congress in special session, and communicate to it the reasons for such proposed military action.<sup>6</sup>

On the same day Norris introduced a resolution calling for the investigation of 'charges against the State Department' of attempting to secure publicity for propaganda tending to impair friendly rela-

<sup>1</sup> S. Res. 327, Jan. 18, 1927.

<sup>2</sup> Press report, Jan. 21, 1927.

<sup>3</sup> *Ibid.*, 2233. The vote was 79 to 0.

<sup>4</sup> Press report, Jan. 18, 1927.

<sup>5</sup> Jan. 22, 1927, *Cong. Rec.*, 2113.

<sup>6</sup> Jan. 21, 1927, *Cong. Rec.*, 2057.

tions with Mexico.<sup>1</sup> Both of these resolutions were referred to the Committee on Foreign Relations, from which they did not emerge. Some weeks later, its chairman introduced a resolution authorizing that committee 'to investigate and study conditions and policies bearing upon the relationship between Central American countries, Mexico, and the United States'; to visit such countries, to sit in recess of Congress, with the usual powers of an investigating committee, and with an allowance for expenses of \$10,000 to be paid from the Senate's contingent fund.<sup>2</sup> Modified to confine the committee's sittings to places within the United States and to limit to citizens of the United States its power to summon and question witnesses, this resolution was reported favorably by the Committee on Foreign Relations, and then referred to the Committee to Audit and Control the Contingent Expenses of the Senate, from which no report was received.<sup>3</sup> But the boldness of this proposal to authorize a Senate committee to pursue in foreign lands its independent investigation of conditions already under close observation by the State Department challenged attention both at home and abroad.<sup>4</sup>

Disproportionate notice was also called forth by Chairman Borah's action in communicating by telegraph directly with the Mexican President, instead of seeking the desired information through the State Department. It was asserted that by this action the Senator had violated the Logan Act, thus making himself liable to a fine of \$5000 and to three years' imprisonment in the federal penitentiary.<sup>5</sup> In explaining his action, Borah cited instances where earlier chairmen of the Committee on Foreign Relations (Sumner and Lodge) had communicated directly with foreign governments; and declared that the Logan Act did not apply to a case where an individual merely sought information, as he had done, but only to one who should attempt to influence a foreign government's policy. It was less the legal technicalities than the spirit of the action that affronted the

<sup>1</sup> S. Res. 331, *Cong. Rec.*, 2058. The explanation offered by the State Department was criticized in the Senate as lame and unconvincing.

<sup>2</sup> S. Res. 366, Feb. 22, 1927.

<sup>3</sup> *Cong. Rec.*, 4975.

<sup>4</sup> 'Without the employment of unlimited debate, we would have seen a subcommittee of the Committee on Foreign Relations roaming the world as a subsidiary ministry for foreign affairs, and intermeddling in all our international relations.' Senator George H. Moses.

<sup>5</sup> Act of Jan. 30, 1799. Borah said that he telegraphed directly for the information because, 'when I go to the State Department, they give me data, but insist that it be kept confidential. I don't want to accept information that way.' *Boston Herald*, March 1, 1927, printed cables of Jan. 22 and 24.

Coolidge Administration,<sup>1</sup> and that called forth jubilant acclaim in Mexico:

Borah, friend of Mexico! That is the cry in Mexico, today, following the Senator's open break with President Coolidge over the Mexican situation, and his opposition to the State Department's attitude. . . . Mexico's position has been strengthened by Mr. Borah's action.<sup>2</sup>

Viscount Bryce once referred to the Chairman of the Committee on Foreign Relations as 'a sort of second Secretary of State.' But what if this 'second Secretary of State' persistently antagonizes the influence of the 'first Secretary of State,' and 'strengthens the position' of the very country with which the United States is in controversy? Popular approval of the attitude of the Chairman as compared with that of the Secretary in any particular case must not obscure the fact that such divided counsels as to our foreign relations cannot fail to lower the Government's power and prestige in its dealings with other nations. America should speak to foreign governments with one voice, not with two.

Experiences such as these raise the question whether a more consistent handling of our foreign relations might be effected if the Secretary of State (and other heads of departments) were given a seat and the right to speak in the Senate.<sup>3</sup> In that case he could not evade the issue. Differences between the Secretary and Senate leaders would be brought into direct discussion. In other countries the Secretaries for Foreign Affairs have to stand such an ordeal. Perhaps the best result to be anticipated from such a change would be the incitement to Presidents to a most discriminating choice of Secretaries of State, and to the determination upon a steady policy which would prove least vulnerable to attack.

<sup>1</sup> It was recalled that President Wilson declined to receive Viscount Grey, Special Commissioner to the United States, who was said to have conferred with Chairman Lodge. In 1928, there was some discussion of the applicability of the Logan Act to the sending by Congressman Britten, chairman of the House Committee on Naval Affairs, of a communication to Prime Minister Baldwin, proposing a conference by an Anglo-American legislative committee for friendly discussion of further reduction of naval limitation. The Prime Minister replied that he had learned of this proposal 'with great interest' and that he 'cordially reciprocated the spirit' which inspired the suggestion; but he added: 'It would not be consistent with the courtesy which I owe to the United States Government to express any further opinion on the proposal, on which, as I understand it, they have not been consulted.' This reply was sent to the British Embassy at Washington, endorsed: 'For submission to the State Department in the first instance.' This reply was read by Mr. Baldwin in the House of Commons, Dec. 3.

<sup>2</sup> Cable from Mexico City, *Worcester Evening Gazette*, March 3, 1927.

<sup>3</sup> For discussion of Cabinet members' seats in the Senate, see p. 715.

Individual Senators, upon their own responsibility, often seek to inform themselves at first hand as to foreign conditions, involved in problems which come before the Senate. Recognized as a part of the United States' treaty-making power, they are usually accorded excellent opportunities for observation, at least of anything for which the foreign government wishes publicity. But a Senator's part in Senate debate may have made him *persona non grata* in the land which he seeks to visit. Thus, in 1927 Senator William H. King fared forth to visit Porto Rico, the Virgin Islands, and Haiti, but was intercepted *en route* by notice that because of his public utterances the Haitian Government considered him undesirable, and that access to Haitian territory was forbidden to him. After conference with the Haitian Minister the Secretary of State cabled to the Haitian President that his objections to King were an affront to the United States Senate. Within an hour came the response that under no circumstances would King be allowed to land in Haiti, the President declaring: 'Mr. King's utterances are an insult to me and to my people.'<sup>1</sup> Whereupon Secretary Kellogg issued the statement:

Haiti is a sovereign republic, and fully within her rights in saying who shall land there, and there is nothing more which the United States can do about it. Senator King has been so notified.<sup>2</sup>

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#### INFLUENCE OF THE HOUSE OF REPRESENTATIVES IN FOREIGN RELATIONS<sup>3</sup>

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Although the Constitution assigns the treaty-making power to the President 'by and with the advice and consent of the Senate' alone, on many occasions the House has strongly urged its constitutional right to have a share in determining by what treaty obligations the United States shall be bound. For hardly any treaty is concluded which does not call for some appropriation to carry it into effect; or involve the raising of revenue, all bills for which purpose 'shall

<sup>1</sup> He had said in the Senate that Borno was illegally elected President of Haiti.

<sup>2</sup> *Time* (March 21, 1927), 10.

<sup>3</sup> Crandall, *op. cit.*, 164-99; Hinds, *House Precedents*, ch. 48, secs. 1502-37.

originate in the House of Representatives'; or deal with subjects already covered or to be covered by laws of the United States made in pursuance of the Constitution and by the Constitution put upon the same plane with treaties as the supreme law of the land.

The very first Congress had not come to an end when the Senate found itself faced by one of these dilemmas.<sup>1</sup> It was clear that American captives could not be released and a treaty concluded with the Dey of Algiers, unless a considerable sum of money were at hand, and to the Senate, which had advised and consented that the President 'take such measures as he may think necessary . . . provided the expense do not exceed forty thousand dollars,' Washington replied that he would proceed in the matter as soon as the necessary money had been appropriated by Congress. The Senate thereupon advised suspension of action 'until the situation of the treasury shall more clearly authorize the appropriation of money for that purpose,' and the matter went over to the next Congress, when a committee of the Senate was instructed to confer with the President upon the problem.<sup>2</sup> In his notes of these conferences, Jefferson bluntly recorded:

The Senate were willing to approve this [the President's proposal to redeem the captives and to make peace on the payment of an annual tribute], but unwilling to have the Lower House applied to previously to furnish the money; they wished the President to take the money from the Treasury or open a loan for it. They thought that to consult the Representatives on one occasion would give them a handle always to claim it, and would let them have a participation of the power of making treaties, which the Constitution had given exclusively to the President and Senate. They said, too, that if the particular sum was voted by the Representatives, it would not be a secret.<sup>3</sup>

As to Washington's attitude:

The President had no confidence in the secrecy of the Senate, and did not choose to take money from the treasury or to borrow, but he agreed he would enter into provisional treaties with the Algerines not to be binding on us until ratified here.<sup>4</sup>

Jefferson was opposed 'to hazarding this transaction without the sanction of both Houses,'<sup>5</sup> and, from this time on, the President took

<sup>1</sup> The working-out of the solution to this complicated problem is well presented by Professor Hayden, *The Senate and Treaties*, 1789-1817, 40-53.

<sup>2</sup> Senate *Executive Journal*, I, 72-73; 75.

<sup>3</sup> Jefferson, *Writings* (Definitive ed.), I, 294-95.

<sup>4</sup> *Ibid.*, 305-09.      <sup>5</sup> *Ibid.*, cited by Hayden, 47.

pains to keep the House as carefully informed as the Senate of the status of our affairs in the Mediterranean. Presently the House was induced to pass a bill, which the Senate approved, appropriating 'a sum of fifty thousand dollars . . . to defray any expense which may be incurred in relation to the intercourse between the United States and foreign nations,' and the Senate, in response to another particularized request for its advice and consent, agreed to approve a treaty or treaties calling for a preliminary payment of the precise sum which had thus been appropriated.<sup>1</sup> The President and the Secretary of State — whether from doubts as to the Executive's constitutional powers or from considerations of expediency — declined to negotiate the treaty until the House had concurred in the necessary appropriation.

Within five years this undecided question of the Representatives' relation to treaties was raised in a new form, this time by the aggressive action of the House. Jay's Treaty proved so unpopular that even after amending it the Senate had consented to its ratification with not a single vote to spare, and even then Washington hesitated to proceed with the exchange of ratifications. February 29, 1796, by proclamation of the President it became a part of the supreme law of the land.<sup>2</sup> If the commissions for which its articles provided were to be organized, certain expenditures must be made. March 24, by a vote of nearly two to one, the House adopted a resolution calling upon the President for a copy of the instructions to Jay and other documents relating to the treaty.<sup>3</sup> After mature deliberation and securing written advice, not only from the members of his 'Cabinet,' but from Hamilton, the President returned an unqualified refusal:

As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers can throw no

<sup>1</sup> Hayden, *op. cit.*, 50. Popular approval of the contention of the House for a share in treaty-making is indicated by a resolution adopted by the Virginia legislature for the amendment of the Constitution so as to provide that 'No treaty containing any stipulation upon the subject of powers vested in Congress by the 8th section of the 1st Article of the Constitution shall become the Supreme Law of the Land until it shall have been approved in those particulars by a majority of the House of Representatives'; and that 'the President, before he shall ratify any treaty shall submit the same to the House of Representatives.' *Journal of the House of Delegates*, Dec. 12, 1795, 91-92. Cited by A. J. Beveridge, *Life of John Marshall*, II, 142.

<sup>2</sup> Crandall, *Treaties*, 165-67; Malloy, *op. cit.*, 590.

<sup>3</sup> Vote of 62 to 37. *Annals of Congress* (1796), 759-60.

light, and as it is essential to the new administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.<sup>1</sup>

He referred to the fact that the Constitutional Convention, over which he himself had presided, had explicitly rejected the proposition that no treaty should be binding that was not ratified by a law, and that hitherto the House had acquiesced in the view that the power of making treaties was exclusively vested in the President and Senate. The situation was debated at length.<sup>2</sup> Ultimately the appropriation was made, but by vote of 57 to 35 the House passed a resolution, which, while disclaiming for the House any share in treaty-making, declared:

When a treaty stipulates regulation on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon, as, in their judgment may be most conducive to the public good.<sup>3</sup>

It was Jefferson's belief that it was advisable to 'consult the Lower House previously, where they were to be called upon afterwards, and especially in the case of money, as they held the purse strings, and would be jealous of them.'<sup>4</sup> This led him, years later, to broach to his Cabinet his intention, in order to complete the Louisiana Purchase at the earliest moment, to lay the treaty before both Houses of Congress at once. Madison and Gallatin earnestly opposed such action, both because it was not the intent of the Constitution that the Senate's consideration of an unratified treaty should be influenced by discussion in the House, and inevitably in the public press, and because the novelty of the procedure would be likely to cause delay

<sup>1</sup> March 30, 1796. *Messages*, I, 194-96; Hinds, *House Precedents*, sec. 1509. For similar refusals of Presidents to submit treaty-negotiators' instructions to the House, see (Jackson) *Messages*, II, 608, and (Polk) *ibid.*, IV, 565-67.

<sup>2</sup> Probably the most eloquent and persuasive speech was that by Fisher Ames, April 28, 1796, *Works*, II, 37-71. Butler, *op. cit.*, I, 428.

<sup>3</sup> *Annals of Congress* (April 1, 1796), 771-83. The bill making the requisite appropriations passed the House May 3, 1796. *Ibid.*, 1295.

<sup>4</sup> *Writings* (Ford ed.), VII, 67.

rather than dispatch.<sup>1</sup> Jefferson yielded to their persuasion, and in his message to Congress announced:

When these treaties shall have received the constitutional sanction of the Senate, they will without delay be communicated to the Representatives also for the exercise of their functions as to those conditions which are within the powers vested by the Constitution in Congress.<sup>2</sup>

Although the House has repeatedly asserted its right to exercise its discretion when called upon to make appropriations in fulfillment of treaty stipulations, nevertheless it has recognized the country's moral obligation to the extent that it has never failed to appropriate the money thus pledged.<sup>3</sup> Furthermore, in two instances it has roundly denounced other governments which have demurred at fulfilling duly ratified treaties. In 1834, when the French Government refused to make the first payment due to the United States under its treaty, by unanimous vote the House declared that the treaty must be maintained and its execution insisted on.<sup>4</sup>

In the bill appropriating \$7,200,000 for the purchase of Alaska, the House took pains to state that in a matter of this kind 'Congress has jurisdiction; and it being for such reason necessary that the consent of Congress shall be given to the said treaty before the same shall have full force and effect,' upon these conditions they had taken into consideration the said treaty and had approved of the stipulations

<sup>1</sup> Crandall (*Treaties*, 173), refers to MS. Jefferson Papers, Series 3, VIII, no. 83, and IV, no. 128. Jefferson, *Writings*, VIII, 266; Gallatin, *Writings* (Adams ed.), I, 156.

<sup>2</sup> Annual message of Oct. 17, 1803. E. S. Brown, *Constitutional History of the Louisiana Purchase*, esp. ch. IV, 'The Debate on the Treaty: The Treaty-Making Power,' 49-61. This chapter utilizes effectively material from Plumer's *Memorandum*.

<sup>3</sup> Foster, *op. cit.*, 310, and n. 1.

For further discussion of the obligation of Congress to carry out treaty stipulations see the following: Charles E. Hughes, in address on 'The Proposed Covenant of the League of Nations,' New York, March 26, 1919; Oliver Ellsworth, MS. Letters to Washington, vol. 278, p. 287; John Forsyth, in speech in Senate, 1796, quoted by Kellogg, in Senate Debate, Aug. 7, 1919, in discussion of this topic (*Cong. Rec.*, 3680-88); Quincy Wright, 'Treaties and the Constitutional Separation of Powers,' *American Journal of International Law*, XII, 64-95; C. H. Butler's summary of publicists' opinions, *op. cit.*, I, 444-48.

<sup>4</sup> In 1819, when the King of Spain demurred at ratifying the treaty which he had authorized his envoy to make, Secretary of State J. Q. Adams declared that the United States would be justified in taking 'that which the treaty if perfect [i.e., if ratifications had been exchanged] would have bound Spain to deliver to them.' On the initiative of the House, a bill was passed authorizing the President to take possession of Florida, although the King had not ratified the treaty. Chalfant Robinson, *Two Reciprocity Treaties*, 170; Crandall, *Treaties*, 174-75, on the tension with France. See also J. B. Moore, *History and Digest of International Arbitrations*, V, 4463-68; Hinds, *House Precedents*, sec. 1502.

therein.<sup>1</sup> The Senate promptly cut out this part of the bill and sent to the conference committee a bill declaring that the House was absolutely bound to carry out stipulations of a treaty consented to by the Senate.<sup>2</sup> As finally passed, the bill was prefaced by this clause: 'Whereas said stipulation cannot be carried into full force and effect except by legislation to which the consent of both Houses is necessary.'<sup>3</sup>

Not only has the House protested against its being bound to make appropriations to carry out treaty stipulations to which its consent has not been asked, but it has even more strongly denounced as usurpation the treaty-making power's encroachment upon domains explicitly given by the Constitution to Congress or even exclusively to the House of Representatives; namely, the regulation of commerce with foreign nations and the originating of bills for the raising of revenue. And here some of the most eminent men ever in the Senate have held that the claims of the House were well grounded. Thus, in 1844, Rufus Choate, for the Committee on Foreign Relations, opposed the ratification of the commercial treaty with the German Zollverein, on the ground that thereby the President and Senate, by the instrumentality of negotiation, would repeal or materially vary regulations of commerce and laws of revenue which Congress had ordained,<sup>4</sup> and that if the treaty were ratified the faith of the House would thereby be pledged to carry out its stipulations, which he believed should be done by Act of Congress rather than by a treaty.<sup>5</sup> Webster and Benton took a similar view, holding that the prerogatives of the House in the field of revenue legislation ought to be scrupulously respected.

Except when previously authorized by Act of Congress, reciprocity treaties have probably never come before the Senate without arousing protest on the floor of the House. In 1875, the reciprocity treaty with Hawaii contained an innovation in the provision that it should

<sup>1</sup> Other 'considerations' are said to have weighed with some persons concerned. A memorandum in the handwriting of President Johnson details a conversation in which Seward, then Secretary of State, told him that in the House the appropriation of \$7,200,000 was 'hung up' until \$30,000 had been paid to John W. Forney, late Secretary of the Senate and proprietor of two daily newspapers; \$20,000 to two lawyers; \$8000 to N. P. Banks, Chairman of the House Committee on Foreign Affairs, and \$10,000 to Thaddeus Stevens, Chairman of the Committee on Appropriations. See W. A. Dunning, 'Paying for Alaska,' *Political Science Quarterly*, Sept., 1912.

<sup>2</sup> J. B. Moore, *Digest of International Law*, V, 226-29; *Cong. Globe* (1867-68), 4031; 4159; 4392; Chalfant Robinson, *Two Reciprocity Treaties*, 173.

<sup>3</sup> Hinds, *House Precedents*, sec. 1508.

<sup>4</sup> *Ibid.*, 1532.

<sup>5</sup> Crandall, *Treaties*, 189-90.

not take effect 'until a law carrying it into effect shall have been passed by the Congress of the United States of America.'<sup>1</sup> The necessary bill was passed, though not without long debate in which were rehearsed the old-time arguments as to the right of the House to reject a treaty. When, at this treaty's expiration, it was renewed for another period of seven years without being submitted to the House of Representatives, the controversy broke out again. From J. Randolph Tucker, for the Judiciary Committee, came a report which is the classic defense of the thesis: 'A treaty cannot change revenue laws without the sanction of the House of Representatives.'<sup>2</sup>

In advising the ratification of the reciprocity convention with Mexico, signed January 20, 1883, the Senate amended it so as to provide that it should not go into effect 'until laws necessary to carry it into operation' had been passed by Congress. Although the period stipulated for the passage of these laws was repeatedly extended, the House of Representatives failed to take any action, thus for the first and only time in our history obstinately insisting upon its right to use its own discretion in giving effect to a treaty after the ratifications had actually been exchanged.<sup>3</sup>

In consenting to the ratification of the reciprocity convention with Cuba, March 19, 1903, the Senate attached an amendment requiring that it should not take place until it had been 'approved' by Congress;<sup>4</sup> and in that approving Act there was inserted a clause declaring that nothing therein 'should be construed as an admission on the part of the House that customs duties could be changed otherwise than by an Act by Congress originating in the House.'<sup>5</sup> By the Tariff Act of October 3, 1913, authorizing the President to negotiate reciprocity agreements with foreign nations, it was expressly provided that 'said trade agreements before becoming operative shall be submitted to the Congress of the United States for ratification or rejection.'<sup>6</sup>

<sup>1</sup> Malloy, *op. cit.*, 917. Art. V of the reciprocity treaty with Great Britain (1854) had made its going into effect await the passing of laws required to put it in operation, by Parliament and by Congress. *Ibid.*, 672.

<sup>2</sup> Reprinted in full as ch. XI, in H. St. G. Tucker's *Limitations of the Treaty-Making Power*. 'I think no Committee of this House would ever present a report on this question which did not embody substantially the report of Randolph Tucker, . . . from the reasoning of which I think any lawyer who will fairly read it will say there is no escape.' (S. E. Payne, *Cong. Rec.*, XXXV, 1183.) Hinds, *House Precedents*, secs. 1528-30; Butler, *op. cit.*, I, 439-41.

<sup>3</sup> Chalfant Robinson, *Two Reciprocity Treaties*, 175.

<sup>4</sup> Malloy, *op. cit.*, 357.

<sup>5</sup> 33 *Statutes at Large*, 3; Crandall, *Treaties*, 194; Hinds, *House Precedents*, sec. 1531.

<sup>6</sup> 38 *Statutes at Large*, 192. Crandall, *op. cit.*, 195.

Since the treaty-making power may make law in divers domains ordinarily covered by Acts of Congress, the question has often been raised as to the effect upon each other of two enactments, coming from different sources, but each purporting to be a part of the supreme law of the land. Said Mr. Justice Gray:

A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation is open to future repeal or amendment. If the treaty operates by its own force and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control.<sup>1</sup>

In the early years the House exercised an especially restraining influence on Indian treaties, since they usually involved payments of money or the disposal of public land. Usually Congress made appropriation before a given negotiation was started, and the propriety of this method was recognized by resolution introduced by Senator White in 1828, declaring that no Indian treaty for the purchase or exchange of land ought to be negotiated without a previous appropriation by Congress.<sup>2</sup> In 1867 — significantly as a part of the appropriation bill to cover deficiencies in the contingent expenses of the Senate — it was enacted: ‘No expenses shall hereafter be incurred in negotiating a treaty with any Indian tribe until an appropriation authorizing such an expense shall be first made by law.’<sup>3</sup>

Other topics upon which the House has been jealous of the exercise of the treaty-making power have been the acquisition and cession of territory. In 1803, a resolution was introduced into the House calling for the papers relating to the negotiation for the purchase of Louisiana. It was supported by men of both parties, but defeated by a vote of 51 to 35. The necessary appropriations were then made.<sup>4</sup>

<sup>1</sup> *Fong Yue Ting v. U.S.*, 149 U.S. 721, quoted by Mr. Hayes in debate in the House, Jan. 23, 1907; *Cong. Rec.*, XLI, 1579.

<sup>2</sup> *Senate Executive Journal*, V, 138.

<sup>3</sup> In 1871 — again as part of an appropriation act — Congress put an end to the making of treaties with Indian Tribes. *Statutes at Large*, XV, 9; XVI, 566; *R. S.*, sec. 2079; Hinds, *House Precedents*, secs. 1534–36.

<sup>4</sup> *Annals of Congress*, 7th Cong., 2d sess., 367, Jan. 11, 1803. See also the debate over the constitutional right of the House to a voice in any treaty ceding territory. (Hinds, *House Precedents*, sec. 1507.) The following topics are discussed fully by C. H. Butler, *op. cit.*: Treaty Stipulations and Tariff Statutes (II, 67–72); Treaty-Making Power to Appropriate Money (II, 76); Treaty-Making Power and Extradition (II, 79–81); and Chinese Exclusion Cases (II, 87–123); ‘How far treaty stipulations become operative *ex proprio vigore*, and without legislative assistance’ (with special reference to the treaty with Spain, 1898, and the Insular Cases) (I, 441–43, and Appendix, 459–585).

In 1925, the House again took the initiative in a matter of foreign policy. February 3, nearly two years from the day when President Harding first submitted to the Senate his urgent recommendation that the adherence of the United States be given to the Permanent Court of International Justice, Representative Burton, a former member of the Senate, from the Committee on Foreign Affairs submitted a resolution expressing the House's 'cordial approval of said court and an earnest desire that the United States give early adherence to the protocol establishing the same, with the reservations recommended by President Harding and President Coolidge,' and declaring 'that the House expresses its readiness to participate in the enactment of such legislation as will necessarily follow such approval.'<sup>1</sup>

On the closing day of the Sixty-Eighth Congress, during consideration of this resolution, Burton declared: 'If we adhere, certain action must be taken by way of appropriations; and it is for us, at least in that regard, to express our opinion.'<sup>2</sup> Questioned as to whether in the last analysis this would not be a matter of treaty, and therefore lie with the Senate exclusively, he replied:

We could pass a resolution initiated in this House, in which if the Senate concurred, it would be binding. On several occasions the Congress has done that. We annexed Texas by resolution originating in this House after a treaty had failed. We annexed Hawaii by a resolution introduced in this House, and passed in the Senate after a treaty had failed. We took the initiative for peace with Germany... in 1921, and we could here; but I say the other is much the better way — by treaty.

<sup>1</sup> *Cong. Rec.*, 2978; H. Res. 426. On the same day the House adopted an amendment to the Naval Appropriation Bill 'authorizing' the President to call another conference for the limitation of armament.

<sup>2</sup> 68th Cong., 2d sess., H. Rept. 1569, *Cong. Rec.*, 5405–06, March 3, 1925.

In contrast with this resolution, in which the House encouraged and pledged financial backing to the Senate's favorable action upon a pending 'treaty,' two generations earlier, the House had bluntly put itself in opposition to a treaty, even before it had been submitted to the Senate. It was known that negotiations were under way for the purchase of the Danish West Indies. Nov. 25, 1867, a Wisconsin Representative introduced the following resolution:

That in the present financial condition of the country, any further purchases of territory are inexpedient, and this House will hold itself under no obligation to vote money for any such purchase unless there is greater necessity for the same than now exists. (*Cong. Rec.*, 792.)

In debate, he declared:

I intend to serve notice upon the King of Denmark that this House will not pay for that purchase; and I mean to serve notice upon the world that we will pay for no purchase that the Secretary of State, on his own motion, may see proper to make.

The overwhelming vote, 93 to 43, by which this resolution was adopted, reflected the popular disapproval of Seward's expansionist policy. This warning was thus given by the House a week before the treaty was submitted. As is well known, this treaty was 'delayed to death' — held for more than two years by the Committee on Foreign Relations, then reported adversely, and never acted upon by the Senate (p. 627, n. 2).

The resolution was briefly debated. It met with no opposition, but was supported by Burton in a speech of exceptional eloquence, and was adopted by the House by a vote of 303 to 28. Not till nearly a year later did the Senate take action<sup>1</sup>—weighting its consent to ratification with hostile reservations certain to prove unacceptable to the forty-eight powers which had already 'entered the Court.'

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#### THE SENATE'S RELATION TO SOME POST-WAR TREATIES

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The unique conditions which the Senate's constitutional powers impose upon treaty-making between the United States and other nations are strikingly illustrated in the history of Senate action upon some treaties negotiated for the settlement of critical international issues at the end of the World War. In no other period have the questions at stake been so momentous and in none have the Executive and the Senate each used such extraordinary methods to bend the other to its will.<sup>2</sup>

Breaking the precedent of six score years, President Wilson appeared in person before the Senate, January 22, 1917, to make a communication concerning the country's foreign relations.<sup>3</sup> He stated his purpose as follows:

I have sought this opportunity to address you because I thought that I owed it to you, as the council associated with me in the final determination of our international obligations, to disclose to you without reserve the thought and purpose that have been taking form in my mind in regard to the duty of our Government in the days to come, when it will be necessary to lay afresh and upon a new plan the foundation of peace among the nations.... This Government should frankly formulate the

<sup>1</sup> Pages 692-94. Jan. 27, 1926.

<sup>2</sup> This summary is concerned with the tactics used, and only incidentally with the principles and personalities involved in the struggle. Its broader aspects are presented with great clarity and coolness of judgment by H. Barrett Learned, in 'The Attitude of the United States Senate Toward the Versailles Treaty,' VI, ch. V, *A History of the Peace Conference of Paris*. (Edited by H. W. V. Temperley; issued under the auspices of the Institute of International Affairs. Henry Frowde, Oxford University Press, 1924.) In preparing this section, the writer has been greatly indebted to this scholarly essay and to personal suggestions from Dr. Learned.

<sup>3</sup> Beginning April 8, 1913, he repeatedly addressed the Senate and House in joint session.

conditions upon which it would feel justified in asking our people to approve its formal and solemn adherence to a League for Peace.... No covenant of co-operative peace that does not include the peoples of the New World can suffice to keep the future safe against war.... There is no entangling alliance in a concert of power.<sup>1</sup>

It is not necessary here to set forth the program which he then presented. The point to be noted is that nearly three months before the United States even entered the war, President Wilson felt it his duty to disclose to the Senate his thought and purpose as to this country's taking its place in a League for Peace. January 8, 1918, in an address before Congress he enunciated the 'fourteen points' which it seemed to him should be considered as essentials in ending the conflict,<sup>2</sup> and these and the principles set forth in two later addresses were put forward by the Germans in asking for an armistice, and were accepted with qualifications by the Allies as a basis for negotiation. It was because of this tentative acceptance of proposals which he himself had framed that President Wilson felt it his duty to go to Paris to take part in the peace negotiations. In announcing this determination at the opening session of Congress, December 2, 1918, he assured his hearers: 'I shall be in close touch with you, ... and you will know all that I do.'<sup>3</sup> Two days later he sailed for France.

A fortnight before the Armistice was signed, on the eve of the national election President Wilson had appealed thus to his countrymen:

If you have approved of my leadership and wish me to continue to be your unembarrassed spokesman in affairs at home and abroad, I earnestly beg that you will express yourselves unmistakably to that effect by returning a Democratic majority to both Senate and the House.<sup>4</sup>

<sup>1</sup> *Cong. Rec.*, 1741-43.

<sup>2</sup> *Ibid.*, LVI, 690-91.

<sup>3</sup> *Ibid.*, LVII, 8.

<sup>4</sup> Oct. 25, 1918. *Washington Post*, Oct. 26. In his *Recollections* (p. 363) Vice-President Marshall later commented: 'I saw the time when the President had the Republican party in the Senate so split as to be, himself, in absolute control and domination of American affairs. I saw this split knit together with bonds of steel, by the letter he wrote preceding the election of 1918.' For comments by two other friendly critics, both of whom thought the issuing of this partisan appeal a serious mistake, see *Intimate Papers of Colonel House* (IV, 68, n. 1) and *Letters of Franklin K. Lane*, who wrote Nov. 1, 1918: 'Things are at a white heat over the President's appeal to the country to send a Democratic Congress. He made a mistake.... My notion was, and I told him so at a meeting three or four weeks ago, that the country would give him a vote of confidence because it wanted to strengthen his hand. But Burleson [Postmaster-General] said that the party wanted a leader with guts — that was his word and it was a challenge to his [the President's] virility that was at once manifest' (p. 297).

The response from the country should have disillusioned him, for the election returns showed that the new Senate, which would pass upon the treaty to be negotiated at Paris, would be controlled by a Republican majority, a result which he himself had said would be interpreted abroad as a repudiation of his leadership. Moreover, despite the theoretical objections that had repeatedly been urged against the service of Senators on peace missions, there was evident resentment among the Senators that none from their number had been included in the group of men — not submitted to the Senate for confirmation — whom the President had named as his colleagues.<sup>1</sup>

He sailed for France, therefore, knowing that the Senate was to be controlled by the Republicans, that in its new organization the chairmanship of its dominant Committee on Foreign Relations would doubtless go to Senator Lodge than whom no one in the country stood more jealously for the Senate's constitutional share in the 'making' of treaties, and that there was grave dissatisfaction with the makeup of the Peace Mission, because it included no member of the Senate, no representative member of the party which was to control the Senate, and no other American who in the mind of the people was of commanding eminence.

In the early weeks of the Congress little was heard of what was being done at Paris, but the most influential Senate leaders at once made plain their belief that a distinct and separate Treaty of Peace should first be made and that the formulation of a Covenant for a League of Nations should be postponed to a later time when its problems could be studied more dispassionately.<sup>2</sup>

February 14, 1919, on the morning of the day when President Wilson was to read to a plenary session of the Peace Conference the newly completed draft of what he called 'a constitution for a League of Nations,' he cabled from Paris to Washington an invitation to the members of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs to dine with him at the White

<sup>1</sup> On the very first day of the session, even before the President came before the Senate, there had been introduced a resolution providing for a committee of eight Senators, four Republicans and four Democrats, who should go to Paris as observers for the duration of the Conference, in order that they might report and advise, when the treaty should come before the Senate. (A facetious member suggested an amendment, that the committee consist of ninety-six instead of eight Senators.) The resolution was reported adversely by the Committee on Foreign Relations.

<sup>2</sup> *Cong. Rec.*, LVII, Lodge (724-48); Knox (602-03; 4687-94); Borah (1383-87; 3911-15).

House; and to each of his thirty or more prospective guests he sent the message:

Each article [of this Covenant of the League of Nations] was passed only after a most careful examination by each member of the committee. There is a good and sufficient reason for the phraseology and substance of each article. I request that I be permitted to go over with you, article by article, the constitution before this part of the work of the Conference is made the subject of debate of Congress.<sup>1</sup>

The discussions at that dinner conference, February 26, were confidential, but it is evident that the President made few, if any, converts to his program, and that old antagonisms were deepened.<sup>2</sup>

In the closing hours of the Sixty-Fifth Congress, March 3, 1919, Lodge offered the following resolutions:

Whereas under the Constitution it is a function of the Senate to advise and consent to, or dissent from, the ratification of any treaty of the United States, and no such treaty can become operative without the consent of the Senate expressed by the affirmative vote of two-thirds of the Senators present; and . . .

<sup>1</sup> *Cong. Rec.*, LVII, 3689.

Secretary Hay had been similarly anxious that the Hay-Pauncelote Treaty should take definite form before subjected to Senate debate. While the preliminary negotiations were in progress he wrote to Henry White: 'In the usual reckless manner of our Senate, they are discussing the matter with open doors every day, and are getting themselves so balled up with their own eloquence that it is greatly to be feared they will so commit themselves as to consider themselves bound to reject any arrangement that may be made.' (Allan Nevins, *Henry White*, 216.) The Senate later amended this treaty, with the result that it was rejected by Great Britain. The Senate's amendments so exasperated Hay that he tendered his resignation, but the President refused to accept it. A new treaty, embodying the Senate's three most important amendments, was negotiated, approved by the Senate, and ratified by the President and the British Government. Hay's biographer candidly comments: 'We can see that they [the Senate] were wiser than he. If the United States were to build, own, and direct the Canal — and that was Hay's desire — no treaty should be ratified which left any doubt as to their rights: and such a pledge as that which bound them not to fortify the Canal ought not to be made.' (W. R. Thayer, *John Hay*, II, 230.)

<sup>2</sup> Two of the invited guests were not present at this conference. In courteous letters both Fall and Borah expressed the feeling that they could not be bound to treat as confidential information which they believed should be at once available for consideration by their colleagues. Borah wrote in part: 'The differences between the President and myself on this question [of the League of Nations] are fundamental. I am sure no suggestion of mine would modify in the slightest degree the views of the President, and nothing could induce me to support this league as outlined in this proposed legislation, or anything like it. I feel, therefore, that it would not be fair to the President . . . to receive from him confidential information concerning this subject. Neither in my view of the subject could I accept information which I would not feel perfectly free to transmit to my colleagues or use in public debate. After much reflection, I beg, therefore, to be excused from attending the meeting. In writing this note and in taking this course I mean no personal disrespect to, or disregard of the President. I simply find myself in such disagreement with him, and feel so intensely concerning the matter that I cannot do other than candidly advise him of the fact.' (Letter of Feb. 18, published in special to the *New York Times*, Feb. 19, 1919.)

Whereas a committee of the Conference has proposed a constitution for a league of nations, and the proposal is now before the Peace Conference for its consideration: Now, therefore, be it

*Resolved* by the Senate of the United States in the discharge of its Constitutional duty in regard to treaties, That it is the sense of the Senate that, while it is their sincere desire that the Nations of the World should unite to promote peace and general disarmament, the constitution of the league of nations in the form now proposed to the Peace Conference should not be accepted by the United States; and be it

*Resolved further*, That it is the sense of the Senate that the negotiations on the part of the United States should immediately be directed with the utmost expedition to the urgent business of negotiating peace terms with Germany satisfactory to the United States and the nations with whom the United States is associated in the war against the German Government, and that the proposal for a League of Nations to insure the peace of the world should be then taken up for careful and serious consideration.<sup>1</sup>

Consideration of these resolutions was at once blocked, but at Lodge's request they were inserted in the *Record* together with the names of thirty-seven men, Senators and Senators-elect of the Sixty-Sixth Congress, who declared that, had they had the opportunity, they would have voted for these resolutions. By this famous 'round-robin' formal notice was served on the President that this group of Senators utterly disapproved of the feature of the peace settlement which he had most at heart, that they urged the relegation of the League of Nations to the background, and that they held at least four more votes than were needed to defeat any treaty proposal which he might lay before the Senate. Never before nor since in the history of American treaty-making have Senators asserted such a dictatorial attitude while a treaty was in process of being negotiated.

The President's response was immediate and defiant. Addressing a great audience at the New York Metropolitan Opera House the day after this senatorial warning had been given, he declared that when he returned from Paris so many threads of the treaty would be 'tied to the covenant that you cannot dissect the covenant from the treaty without destroying the whole vital structure.'<sup>2</sup> On the morrow he again sailed for France.<sup>3</sup>

<sup>1</sup> *Cong. Rec.*, LVII, 4974.

<sup>2</sup> *Washington Post*, March 5, 1919. Later the names of two who had been absent were added to this list.

<sup>3</sup> While the President was on the ocean, March 8, 1919, Henry White, one of the American delegation at the Paris Conference, cabled to Lodge, requesting him to cable 'the exact phraseology of amendments modifying the League of Nations Covenant which Senate considers important.' The receipt of this request caused great perturba-

The contrast between the tone of President Wilson's response to the Senators' warning note and that of the British Prime Minister to a similar indication of opposition in Parliament was strikingly shown, a month later. April 8, a telegram was sent from three hundred and seventy members of Parliament demanding 'Mr. Lloyd George's adhesion to his election pledges.' 'Public opinion indeed necessitated the return of the Prime Minister to England on the 14th of April to speak in the House.' The very next day after the sending of this British counterpart to the Senators' 'round-robin' came the Prime Minister's reply, that he would keep his pledges; and on the 15th of April he spoke in the House of Commons, explaining his course.<sup>1</sup>

tion among the Republican Senate leaders. Lodge considered it a 'trap' to get the Senate committed in advance to an approval of whatever phraseology might be adopted by the Conference for the Covenant and sent a reply, drafted by Root, in the nature of a haughty reprimand to the effect that if the President had wanted to know the wishes of the Senate, he should have consulted them before their adjournment, or should call them in special session. 'Manifestly I cannot now speak for the Senate.' In his posthumous *The Senate and the League of Nations* six pages are devoted to a discussion of this 'trap.' He assumed that White's request must have been sent with the President's knowledge and approval and with the knowledge of the State Department at Washington. Every one of these assumptions was groundless (see White's comments, printed in the *New York Times*, Nov. 9, 1925, which the publishers of Lodge's book have had the candor to reproduce, facing page 124).

What White was trying to do was to get private information from an old friend and Senate leader which would enable White, not the President, to smooth the path for the League Covenant by suggestions of changes in its phraseology while it was still but a tentative draft.

It is interesting to contrast Lodge's chilling 'Manifestly I cannot now speak for the Senate' with the nine-page memorandum which, after long conference with White, Lodge had written out for his guidance, Dec. 2, 1918, in the last hours before White sailed for France to attend the Peace Conference. This Senator, who three months later was to be so affronted by White's request for suggestions of acceptable phraseology, here proposed that his own memorandum be shown by White to Balfour, Clemenceau, and Nitti in order to inform them of 'what I believe to be the real feeling of the people of the United States and certainly of the Senate of the United States. This knowledge may in certain contingencies be very important in strengthening their position.' (With this memorandum in his keeping, it is not strange that White should have cabled his request to Lodge for suggestions.) Professor Nevins (*Henry White*, 352-54) comments: 'Lodge believed that Wilson's ideas misrepresented the United States. He believed it so firmly that he wished to assist the European leaders in impeding and thwarting Wilson. White never thought of showing the paper to any representative of the Allies, and kept it wholly secret.' A startling feature of Lodge's memorandum was his willingness to make the United States a part guarantor of many delicate European settlements. For example: Lithuania, Livonia, and Estonia should be made independent 'under the protection of the Allies and the United States'; and the independence of Czechoslovakia 'must be made secure and sustained by the Allies and the United States in every way.'

<sup>1</sup> *A History of the Peace Conference* (ed. by H. W. V. Temperly), I, 267. Lloyd George's speech appeared in the *Times*, April 17. Ten years later, Winston Churchill queried: 'What would have happened if, for instance, Lloyd George and Clemenceau had said across the table: "We know we speak for the overwhelming mass of our two countries. Test it any way you will. But is it not true that nothing but your fixed

April 29, two days after the publication of the official text of the treaty, Lodge, and Curtis, the Republican whip, feeling certain that a special session of Congress would soon be called, sent telegrams to their Republican colleagues requesting that they 'reserve final expressions of opinion respecting the amended League Covenant... until there had been opportunity for conference.'<sup>1</sup> This was equivalent to official notice of an intent to deal with the treaty as a party measure.

When Congress convened, May 19, after a recess of ten weeks, the Republicans, with a majority of two,<sup>2</sup> assumed control with Lodge as majority leader. July 10, 1919, President Wilson appeared before the Senate, and presented the treaty with an eloquent appeal for its acceptance.<sup>3</sup> He declared:

My services and all the information I possess will be at your disposal and at the disposal of the Committee on Foreign Relations at any time, either informally or in session, as you may prefer; and I hope that you will not hesitate to make use of them.

At the end of his address, it was at once ordered that the injunction of secrecy upon the treaty be removed, and that the treaty be referred to the Committee on Foreign Relations.

In the reorganization of the Senate there had been given to this committee a membership of ten Republicans and seven Democrats, reversing the party allotment in the previous Congress. Of its personnel Lodge wrote: 'It will be seen at once that this was a strong committee and such as the existing conditions demanded.'<sup>4</sup> His interpretation of what 'the existing conditions demanded' seemed sufficiently obvious. The minority leader bluntly declared in Senate

and expiring term of office prevents you from being thrown out of power? Your constitutional authority is not complete. Where is the Senate of the United States? We are told that you have lost control both of the Senate and Congress. Are you just a well-meaning philosopher, eager to reform others? Or do you carry the faith and will of the American nation?" (*The Aftermath*, 149)

<sup>1</sup> Dispatch in *New York Commercial and Financial Chronicle* (May 3, 1919), 1793; cited by Learned, *op. cit.*, 406.

<sup>2</sup> In accordance with precedent, Truman H. Newberry was seated as Senator from Michigan, his credentials being in proper form. At the time of his resignation, Nov. 18, 1922 (when it had become probable that his seat would be declared vacant), he expressed his 'eternal satisfaction' over 'having by my vote aided in keeping the United States out of the League of Nations' (p. 143).

<sup>3</sup> *Cong. Rec.*, LVIII, 2339.

<sup>4</sup> In his posthumous *The Senate and the League of Nations*, 151-52. The membership was as follows: Republicans: Lodge, McCumber, Borah, Brandegee, Fall, Knox, Harding, New, Johnson, Moses; Democrats: Hitchcock, Williams, Swanson, Pomerene, Pittman, Smith (Ariz.), and Shields.

debate that the committee had been packed with men 'practically pledged to oppose the League of Nations,' and John Sharp Williams made the same charge.<sup>1</sup> Ex-President Taft's comment was to the same effect.<sup>2</sup> Four Republicans were added to that party's representation on the committee. The coveted assignments to this premier committee of the Senate are by tradition given to men of comparatively long and distinguished service. Of the four who now became Lodge's colleagues not one had completed a single term: Harding had served four years; New and Johnson, two; while Moses had been a member of the Senate only four months; but every one of the four was clearly to be recognized as an irreconcilable opponent of the League.<sup>3</sup>

During August and September public hearings were held by the committee. August 19, there was a notable conference between the President and fifteen members of the committee at the White House.<sup>4</sup>

September 10, from the Committee on Foreign Relations, Lodge presented its report in the Senate recommending ratification with at least forty-five textual amendments, and four reservations. Within the next few days there were filed the views of the minority (the Democratic members of the committee) and the views of Senator McCumber, Republican, in disagreement with the majority report.<sup>5</sup>

<sup>1</sup> Hitchcock: 'I know Republicans who feel just as I feel, indignant that agreement with the leaders on the treaty should have been made the test whether a Senator should go on the Foreign Relations Committee or not.' April 30, 1919, *Cong. Rec.*, 791-92.

Williams: 'It was not only stacked as a deck of cards might have been against the President because he was President and because he was a Democrat, as the Senator confesses, but it was stacked against him because he was the leader of the movement in favor of a covenant of peace for the world.... The majority of the Committee was not only made up of Republicans, but it was made up of Republicans who came out openly and declared that they were against the league of nations and they were against the treaty of peace; and there is but one Republican left upon the Committee in favor of the league of nations, and the only reason he was left there was because you dared not remove him. I refer to the Senator from North Dakota' (Mr. McCumber). *Ibid.*, 1372-73.

<sup>2</sup> *Cong. Rec.*, 1430, June 20, 1919; D. F. Fleming, *op. cit.*, 141-42.

<sup>3</sup> Three of them had signed the 'round-robin,' and the fourth had declined to attend the White House conference; three had indicated opposition in Senate debate, Johnson and Moses making especially 'isolationist' and derisive speeches.

<sup>4</sup> *Ibid.*, LVIII, 4013-31.

<sup>5</sup> *Cong. Rec.*, 5112-39, 66th Cong., 1st sess., S. Rept. 176, parts 1, 2, and 3. In coming years this report, presented by Lodge, will be read with astonishment. In debate Senator McCumber characterized it thus: 'Not one word is said, not one allusion made, concerning either the great purpose of the League of Nations or the methods by which those purposes are to be accomplished. Irony and sarcasm have been substituted for argument, and positions taken by the press or individuals outside of the Senate seem to command more attention than the treaty itself. It is regrettable that the animosity which centers almost wholly against the League of Nations provision should have been engendered against a subject so important to the world's welfare. It is regrettable that the consideration of a matter so foreign to any kind of partisanship should be influenced in the country as well as on the floor of the Senate by hostility toward or subserviency to the President of the United States.' *Ibid.*, 5356.

September 3, a week before Lodge's cynically hostile report had been placed before the Senate, President Wilson started on a trip to the Pacific coast, with the avowed purpose of appealing to the people of the country in support of the treaty then pending in the Senate—another utterly unprecedented step in American treaty-making. In the course of three weeks he traveled ten thousand miles and made impassioned pleas to great audiences in nearly thirty cities in states of the Far West. But he broke under the strain, and before the end of the month he was back in the White House, his days of leadership at an end.<sup>1</sup>

For weeks the struggle continued. By the end of October the Senate had defeated all the amendments which the committee had presented. Late in the evening of the last day of the session, November 19, 1919, the vote came upon the Lodge resolution of consent to ratification, and with the fourteen reservations previously approved. Earlier in the day the minority leader had presented in the Senate a letter from the President, declaring that in his opinion the resolution as it stood did not provide for ratification, but rather for the nullification of the treaty, and his hope that all true friends of the treaty would refuse to support that resolution. The first vote stood 39 yeas to 55 nays. Reconsidered, the second vote stood 41 yeas to 51 nays.<sup>2</sup> A vote was then taken on a resolution for the treaty's unconditional ratification, and was rejected by a vote of 38 to 53.<sup>3</sup>

But the issue would not down. December 13, Underwood urged that renewed effort be directed to find some basis of compromise. January 30 there were made public the efforts of an informal bipartisan commission, a group of four Republicans and five Democrats

<sup>1</sup> He had gone to the Pacific coast, and had delivered thirty-seven speeches, before his collapse came at Pueblo, Colorado. 'At one of the Cabinet meetings, it was intimated to him that he had better not take the trip, as it might kill him. He promptly replied that he would be willing to give his life for the cause. It was obvious that he could not be dissuaded from the undertaking.' (David F. Houston, *Eight Years in Wilson's Cabinet*, II, 11-13.) Hardly a year had passed when radio became available as the President's medium of communication.

<sup>2</sup> Note Dr. Holt's analysis of this vote with comment on the power placed in the hands of a small group of irreconcilables by the Senate rule, unchanged since 1868, denounced before the Senate on the final day of the debate and vote on the Versailles Treaty as a rule 'in derogation if not in violation of the Constitution of the United States.' (*Op. cit.*, 294-99; *Cong. Rec.*, 8788, Nov. 19, 1919.) Senators at heart opposed to a treaty may help make up the bare majority needed to impose a reservation upon it, intending to make it the more certain of defeat when they rejoin the most determined opponents in the final vote on 'consent to ratify,' where a 'two-thirds' majority is the Constitution's requirement.

<sup>3</sup> *Cong. Rec.*, 8786; 8802; 8803, Nov. 19. For: 37 Democrats, 1 Republican; against. 7 Democrats, 46 Republicans.

of the Senate, who for a fortnight, without avail, had sought to find some modification of the Lodge reservations that would make possible the ratification of the treaty.<sup>1</sup>

February 9, Lodge himself made the motion that brought the treaty again before the Senate. Hitchcock inserted in the *Record* a letter from the President stating certain reservations that were acceptable to him. Ten days before the final vote was taken, Hitchcock placed before the Senate the stricken President's uncompromising statement that in his opinion every one of the so-called reservations was 'in effect a rather sweeping nullification of the treaty.' He added: 'I hear of reservationists and mild reservationists, but I cannot understand the difference between a nullifier and a mild nullifier.'<sup>2</sup>

March 19, 1920, upon the resolution to consent to the ratification of the treaty with fifteen reservations its advocates mustered a large majority, but it lacked seven votes of the constitutional requirement of two-thirds.<sup>3</sup>

The President's treaty thus having been defeated, Congress tried its own hand at peace-making. The first joint resolution, 'declaring peace,' was vetoed by President Wilson on the ground that it did not seek to accomplish any of the objects for which this country had entered the war.<sup>4</sup> A new resolution, presented from the Committee on Foreign Relations and sponsored by a former Secretary of State, Knox, after much debate and amending in each branch, was finally passed by small votes and signed by President Harding, July 2, 1921.<sup>5</sup>

<sup>1</sup> Press statements by Lodge and Hitchcock, inserted the next day in the *Congressional Record*. Democrats asserted that the absolute *impasse* was reached when Lodge, 'with entire nonchalance,' rejected Hitchcock's final offer to accept the Taft reservation on Article 10, which Lodge had stated, two days earlier, conceded all that the Republicans wanted.

For accounts of the origin and work of this 'commission,' see: H. C. Lodge, *The Senate and the League of Nations*, 193-205; H. Maurice Darling, 'Who Kept the United States out of the League of Nations?' *Canadian Historical Review* (Sept., 1929), 196-211; W. Stull Holt, *op. cit.*, 298-305.

<sup>2</sup> *Cong. Rec.*, 4052.

<sup>3</sup> *Ibid.*, 4599. Yeas, 49 (28 Republicans, 21 Democrats); nays, 35 (12 Republicans, 23 Democrats).

The statement has been widely quoted that Lodge was keenly disappointed that this treaty, safeguarded by the reservations which he sponsored, was not ratified. On the other hand, his daughter over her own signature has repeatedly asserted the contrary: 'My father was perfectly delighted and not in the least disappointed when the Senate failed to ratify the League of Nations Covenant. When the vote was taken I was here living in my father's house, and I discussed the subject with him every day.' She declared that he at no time favored our entrance into the League. Mrs. Constance (Lodge) Williams, in press dispatch, Jan. 6, 1930.

<sup>4</sup> H. J. Res., 327, *Cong. Rec.*, LIX, 7747.

<sup>5</sup> *Ibid.*, 3299. Senate, 38 yeas, 19 nays — 39 not voting; House, 263 yeas, 59 nays — 108 not voting. *Ibid.*, 3261-62.

Before the end of the year treaties had been negotiated for restoring friendly relations with Germany, establishing friendly relations with Austria and Hungary, and securing to the United States practically the same treatment to which she would have been entitled, as one of the Allied Powers, under the Treaty of Versailles. To the ratification of these treaties the Senate gave its consent in each case with this identical 'understanding, made a part of the resolution of ratification':

That the United States shall not be represented or participate in any body, agency, or commission, nor shall any person represent the United States as a member of any body, agency, or commission in which the United States is authorized to participate by this Treaty, unless and until an Act of the Congress of the United States shall provide for such representation or participation; and subject to the further understanding, made a part of the resolution of ratification, 'that the rights and advantages which the United States is entitled to have and enjoy under this Treaty embrace the rights and advantages of nationals of the United States specified in the Joint Resolution or in the provisions of the Treaty of Versailles.'<sup>1</sup>

President Harding did not demur at exchanging ratifications of the treaties modified by the addition of these 'understandings,' although in the opinion of former Attorney-General Wickersham they constituted an 'unconstitutional invasion of the Executive power by the Senate,' since under the Constitution it is the President, not the Senate, who shall 'take care that the laws be faithfully executed.'<sup>2</sup>

Mr. Harding resigned his seat in the Senate after his election to the Presidency. Throughout the struggle over the Versailles Treaty he had been a member of the Committee on Foreign Relations. No other President had had such an opportunity to study at first hand the Senate's jealousy of its prerogative in treaty-making. The extraordinary efforts made by him as President to conciliate the Senate in advance of seeking their consent in any matter connected with foreign relations gauged his estimate of the obstructive power of that 'malcontent 34 per cent.' In the first place, he took the precaution to appoint as commissioners to the Washington Conference the two Senators likely to carry most weight, the majority leader who was also the Chairman of the Committee on Foreign Relations, Lodge, and the minority leader, Underwood. If their approval could be enlisted in the very act of the preliminary negotiation, it would seem that the treaties must command consent.

<sup>1</sup> Malloy, *op. cit.*, 2496; 2599; 2697.

<sup>2</sup> G. W. Wickersham, *op. cit.*, 180.

In agreeing to the treaty relating to insular possessions in the Pacific, the commissioners of the four signatory powers united in signing an interpretative declaration which was intended to allay every apprehension particularly on the part of the United States. But discussions in the Senate, while the conference was still in session, showed some Senators so strongly obsessed by the 'alliance bogey' that the President in submitting the conference treaties to the Senate made this plea:

Frankly, Senators, if nations may not safely agree to respect each other's rights, and may not agree to confer if one party to the compact threatens trespass, or may not agree to advise if one party to the pact is threatened by an outside power, then all concerted efforts to tranquilize and stabilize peace must be flung to the winds. Either these treaties must have your cordial sanction, or every proclaimed desire to promote peace and prevent war becomes a hollow mockery.<sup>1</sup>

Yet, only after the treaty had been before the Senate for six weeks and had been subjected to a new reservation of the Senate's own devising, was the Senate's consent to ratification secured with a narrow margin of four votes.<sup>2</sup>

Upon the commission provided by Act of Congress, February 9, 1922, to assist in converting and refunding the war debts owed by European Governments to the United States, the President appointed three members of the Cabinet together with the incoming Chairman of the Senate Committee on Finance and a Representative who had formerly been an influential member of the Senate.<sup>3</sup> Characteristic of the increased disposition of the legislative branch to curb every negotiating activity of the Executive was the prescribing of the minimum interest rate of four per cent in the Act of Congress creating this War Debt Commission. Finding that such a limit made negotiation impossible, the commission disregarded it and came to an agree-

<sup>1</sup> Feb. 10, 1922, *Cong. Rec.*, LXII, 2391.

<sup>2</sup> In speaking of the folly and bad taste of some of the proposed reservations to the treaties that had been negotiated at the Washington Conference, Senator Pepper told the story of the new family in the neighborhood to whom you wished to be agreeable, and so invited them to afternoon tea. They accepted. This he likened to our invitation to the powers to gather at the conference table in Washington in 1921. 'Then,' said Senator Pepper, 'if, after receiving their acceptance, you were to send around to say that there was no implication in this that they were ever to be invited to dinner, your part would correspond to the Senate's, in affixing reservations' to these well-guarded treaties. But at the time of making this comparison, Mr. Pepper had been a member of the Senate only seven weeks, hardly time enough to learn its social code. (Address before the Republican Club in Massachusetts, Feb. 28, 1922.)

<sup>3</sup> Senator Reed Smoot and Representative T. E. Burton. On the question of their eligibility for such appointment, see p. 183.

ment with the commissioners from Great Britain upon a lower rate. To this particular agreement Congress gave its approval without relaxing the fetters upon negotiations with other Governments. Later they were accorded much more lenient terms than Great Britain had accepted.

The Senate's reservation to the peace treaties with Germany and Hungary so tied the President's hands that he did not feel free to appoint commissioners to act even in an advisory capacity with the Reparations Commission.

The best that could be done was to suggest that the Reparations Commission itself should select a number of American citizens whose personnel would be satisfactory to the Secretary of State, but who would have no official relation to the United States Government.<sup>1</sup>

In his New Haven address, Secretary Hughes proposed the service of a board of economic experts to report upon the reparations problem. Despite the fact that that suggestion was virtually carried out and that the report of the three American experts was universally acclaimed as a most important constructive service, Secretary Hughes felt obliged to disclaim all connection of the American Government with the choice of General Dawes and his associates and all responsibility for their work.<sup>2</sup>

The characteristic methods and attitude of the Senate in dealing with broad questions of international relations in the years since the World War have nowhere been more significantly shown than in the twelve years of struggle over the question of the United States' adherence to the World Court. Both the Republican platform of 1920 and Harding's speech of acceptance contained pledges to promote by international association the maintenance of public right by the

<sup>1</sup> G. W. Wickersham, *op. cit.*, 188.

<sup>2</sup> In 1929, the same procedure was followed. The British Ambassador called at the State Department and formally submitted to Secretary Kellogg the names of Messrs. Young and Morgan — men who had already been selected by the European members of the commission — with an inquiry whether their service upon the Commission on Reparations would be agreeable to the American Government. Assured that no objection would be entered, he then proceeded to New York and personally extended the invitation to those gentlemen to serve as unofficial American members of that commission. The United States Government thus maintained the detached position which it had assumed at the outset toward the reparations problem and at the same time, through the veto power it held on the selection of the Americans, conserved its interests in the economic questions of Europe. Mr. Young became the chairman of the commission which evolved the Young Plan, yet the Senate's 'understanding' in ratifying the treaties with Germany and Austria had been observed — that 'the United States shall not be represented or participate' in any such commission unless authorized by an Act of Congress. *New York Times*, Jan. 16, 17, and 18, 1929.

development of law and the decisions of impartial courts. To make progress toward the redemption of that party and personal pledge became the President's earnest purpose. The task was beset by difficulties. Only after two years of deliberation did the President venture to transmit to the Senate a message recommending 'that the United States give its adhesion to the Permanent Court of International Justice.'<sup>1</sup> In framing the constitution of that Court no other jurist had had a larger part than Elihu Root, former Secretary of State and Senator, and President Harding's recommendation was accompanied by a letter in which Secretary of State Hughes set forth four 'conditions or understandings,' drawn up in conference with Mr. Root, with a view to remove every reasonable objection to the United States' entering the Court under such carefully drawn conditions. The President's proposal was referred to the Committee on Foreign Relations, by whom it was allowed to sleep peacefully for more than a year, until its chairman was aroused by one of the most insistent demands ever addressed to a Senate Committee. It was signed by a former Justice of the Supreme Court, John H. Clarke; a former Attorney-General, George W. Wickersham; and other citizens of highest national reputation.

Are we to understand that it is the purpose of the Committee to repudiate the recommendations of both President Harding and President Coolidge in this vital matter? Certainly you cannot plead lack of time. The proposal has been in the hands of your Committee almost fourteen months. As citizens addressing their public servants it is our right to request that some public explanation be made of your failure to act.<sup>2</sup>

A fortnight later the committee reported a resolution advising adherence, with certain Senate amendments — a plan considerably modified from the Harding-Hughes proposals.<sup>3</sup>

Meantime, in his first address to Congress President Coolidge had strongly urged adherence. A year later, following his election by a tremendous majority upon a platform which definitely favored adherence to the Court 'as recommended by President Coolidge,' he again urged adherence, proposing as a fifth condition that 'our country shall not be bound by advisory opinions which may be rendered by the Court upon questions which we have not voluntarily submitted for its

<sup>1</sup> Feb. 24, 1923.

<sup>2</sup> April 8, 1924.

<sup>3</sup> Reported by Pepper. S. Res. 234, Rept. 634. Part 2 presents the views of the minority.

judgment.<sup>1</sup> Throughout that session the proposal slept. On almost the last day of the Sixty-Eighth Congress the House of Representatives took an unprecedented step:—in a matter of foreign relations which in two years had not been brought by the committee to the serious attention of the Senate, the House passed a resolution by a majority of more than ten to one declaring its approval of adherence to the World Court, and its readiness to make such appropriations as that action might involve.<sup>2</sup>

In his inaugural, March 4, 1925, for the third time President Coolidge championed adherence. In the special session of the Senate that began that day, the ranking Democrat upon the Committee on Foreign Relations introduced a resolution that the Senate advise adherence upon the Harding-Hughes-Coolidge conditions.<sup>3</sup> Since no legislation could come before the Senate in that special session, unlimited time was then available to give the matter thorough consideration, but three opponents blocked the attempt to secure a unanimous-consent agreement under which the matter might be debated and carried to conclusive action. On motion of the minority leader, however, by a vote of 77 to 2 the resolution was made the special order for a specified date ten days after the Congress should convene in December, 1925, for its first regular session.<sup>4</sup> On that appointed day the debate was opened by the author of the resolution, the ranking Democrat on the committee on Foreign Relations, since the three senior Republicans upon that committee were 'die-hard' opponents of adherence.<sup>5</sup> After debate in open session had continued for more than a fortnight, and repeated attempts to get a unanimous-consent agreement fixing a date for final action had been blocked by objection, a petition for the application of cloture was filed. Two days later the motion for cloture was adopted.<sup>6</sup> Thereupon debate began, limited to one hour for each Senator; but instead of its continuing for the possible ninety-six hours, it occupied only a part of three afternoon sessions. After many reservations proposed by opponents had been voted down,

<sup>1</sup> Dec. 3, 1924.

<sup>2</sup> March 3, 1925. Vote, 303 to 28. (See p. 693, n. 2.) Contrast with this resolution the one by which the House gave advance notice that it would *not* appropriate money that might be needed for carrying into effect a treaty which had not yet been submitted to the Senate (pp. 692-94).

<sup>3</sup> 69th Cong. S. Res. 5, by Swanson.

<sup>4</sup> March 10, 1925, *Cong. Rec.*, 207.

<sup>5</sup> Swanson opened the debate upon his own resolution. The three ranking Republicans were Borah, Johnson, and Moses.

<sup>6</sup> For discussion of this application of cloture, see pp. 406-07.

the resolution of adherence, with five reservations acceptable to the President, was adopted by a vote of 76 to 17.<sup>1</sup>

The Secretary of State sent formal announcement of this vote of adhesion with its various reservations and understandings to each of the forty-eight powers signatory to the Statute of the World Court. On the day before the adjournment of the March session of the Council of the League of Nations, upon recommendation of the British Foreign Secretary it was decided to convoke delegates of all the Governments then members of the Court and representatives of the United States Government for a conference, September 1, at Geneva, to try to frame a special agreement as to the American reservations.<sup>2</sup> It chanced that the Council's cabled invitation to the United States Government to be represented at that conference arrived almost simultaneously with advices from Geneva of the circular sent out by the Council recommending that the forty-eight signatories of the World Court Protocol indicate opposition to the procedure proposed by the Senate. This chilled whatever disposition might have been felt by the President or the Senate toward the acceptance of the invitation, and the Secretary of State sent a formal declination, accompanied by an expression of regret that the Council should have sought to create

<sup>1</sup> Shortly before the final vote, the resolution of adherence was materially modified by its mover by the addition of a statement, 'as a part of the act of ratification':

That the United States approve the protocol and statute... with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other state or states can be had only by agreement thereto through general or special treaties concluded between the parties to the dispute; and

That adherence to the said protocol... shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall adherence to the said protocol... be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

It was also 'made a part of the instrument of adherence.'

That the signature of the United States to said protocol shall not be affixed until the power signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to said protocol.

(Jan. 27, 1926, *Cong. Rec.*, 2825.) During the debate, opponents had offered reservations in great numbers and variety, with the obvious intent of making our action entirely unacceptable to the nations which had already adhered to the protocol. Shipstead introduced seventeen reservations in one block. Reed (Mo.) proposed making our adherence conditional upon the British Empire's casting but one vote in the choice of judges.

<sup>2</sup> The British Secretary insisted that the protocol of the Court was a multilateral instrument, and that the Senate's conditions upon which the United States' adherence should be based ought also to be embodied in a multilateral instrument. He pointed out ambiguities as to the correct interpretation of certain phrases in the Senate's reservations, and argued that it should not be difficult to frame a satisfactory agreement, if an opportunity could be obtained for discussion with representatives of the American Government.

an impression that there were substantial difficulties in the way of direct communication by the governments individually.

By September 1, only seven small states had communicated to the American Government their acceptance of the Senate's reservations<sup>1</sup> — and six of these sent representatives to the Geneva Conference. At its opening thirty-eight governments were represented. Immediate assent was given to the first three American conditions. In effect the demand that the United States be at liberty to withdraw at any time was also unconditionally accepted. On the other hand, two reservations (providing (1) that the Statute of the Court was not to be amended without the consent of the United States, and (2) that the United States had a right to veto any request for an advisory opinion touching any question in which the United States 'has or claims' an interest) were accepted subject to the qualification that the acceptance might if right be withdrawn by a two-thirds vote 'if it were found that the arrangement agreed upon was not yielding satisfactory results.'<sup>2</sup>

In his Armistice Day address at Kansas City, November 11, 1926, President Coolidge made it plain that in his opinion the United States would adhere to the World Court only upon the conditions laid down by the Senate, and that he would not take the matter to the Senate again. Any fantastic anticipation that those five conditions would be accepted individually by the forty-eight states already adherent to the Court was speedily dissipated. No further acceptances were received. On the other hand, in accordance with the agreement reached at Geneva, upon Great Britain's initiative the governments began sending in their refusals to accept the United States' adherence upon the conditions imposed by the Senate.

In 1928, President Hoover was elected upon a Republican platform explicitly endorsing our entrance to the Court, and that action was strongly urged in his inaugural and in his first annual message to Congress. Meantime, Elihu Root, the American statesman who had been largely instrumental in shaping the original plan of the World Court, in conference with representatives of several foreign governments had worked out a formula as a basis for the United States' adhesion which it was hoped would prove acceptable to the American Government and to the states that had already 'entered the Court.'

<sup>1</sup> Cuba, Greece, Liberia, Albania, Luxembourg, San Domingo, Uruguay.

<sup>2</sup> For a succinct statement of the issues, and summary of the action taken, see *The United States and the World Court*, a bulletin of Dec. 5, 1926, issued by the American Foundation, Inc. See also D. F. Fleming, *op. cit.*, 222-34.

December 10, 1930, in a special message to the Senate President Hoover again urged that it give its allegiance to this movement for peace. The instant the clerk finished reading that message, Borah, Chairman of the Committee on Foreign Relations, rose and asked permission for the printing in the *Record* of a timely editorial from the *New York Evening Sun*: 'When the League Court Comes Out, Kill It!'<sup>1</sup> That single page in the *Congressional Record* presents with startling clarity a chronic 'oppugnation' and obstructionism in the Senate's dealing with foreign relations such as could not last a week in any other nation's parliament in its relation with the 'Foreign Office.' The President of the United States urges that a policy, long considered and clearly endorsed by his party, be carried into effect by the Senate nominally controlled by that party. Instantly the Chairman of the Committee on Foreign Relations — 'a second Secretary of State,' as Lord Bryce characterized the holder of that chairmanship — virtually announced to the world that his utmost endeavor shall be exerted to defeat that purpose.

In 1932 both major parties explicitly endorsed adhesion to the World Court. For years Nominee Roosevelt had advocated that step. The program of national legislation proved so engrossing that for the first year the Court received little attention from President or Senate. In the spring of 1934 the Committee on Foreign Relations, now reorganized with a Democratic majority, held hearings at which strong presentations were made by the advocates and the opponents of adhesion. In January, 1935, the committee presented a favorable report upon an adhesion resolution, and January 16 President Roosevelt sent a special message to the Senate. He insisted that the movement to make international peace practicable and serviceable was not subject to partisan considerations, as Republican and Democratic platforms alike had favored adherence to the Court.

I urge that the Senate's consent be given in such form as not to defeat or to delay the objective of adherence.

The sovereignty of the United States will be in no way diminished or jeopardized by such action. At this period in international relationships when every act is of moment to the future of world peace, the United States has an opportunity once more to throw its weight into the scale in favor of peace.

By unanimous consent it was agreed on Friday that from 1 P.M. on the following Monday, January 28, no Senator should speak more than

<sup>1</sup> *Cong. Rec.*, 504.

one hour upon the resolution, nor a half-hour upon an amendment. The intervening Sunday evening the Reverend Charles E. Coughlin from Detroit in a passionate speech over the radio denounced the World Court as 'a tool of the international bankers and international plutoocrats,' declared that 'war and destruction instead of peace and tranquillity were the fruits America would reap from it,' and called upon his listeners, whether they could afford it or not, that very night to telegraph to their Senators, telling them to vote against America's entrance into the Court.

Few Senators spoke upon the issue in the last two days of the debate, and little that was new was advanced in argument. Norris felt constrained to vote against the resolution. He believed that, without a two-thirds consent vote by the Senate, no matter should be submitted to the Court, and he was persuaded that under the reservation as it stood the United States might enter into a treaty with a given country providing that thereafter all matters of controversy should be submitted to the Court, however remote those controversies might be from anything that was in contemplation at the time such a treaty was made. Closing the debate for the majority, Robinson deplored 'the unfair, unjust, and unreasonable propaganda during the course of this debate, carried on by agencies outside of the Senate,' resulting in a deluge of scores of thousands of telegrams urging Senators to oppose this resolution — every one of those telegrams 'prompted by inflammatory statements in public addresses not based on facts.' Specifically he referred to Father Coughlin's radio talks, saying, 'I think he permitted his imagination to run riot,' and called attention to the wild extravagance of many of his statements.

The vote was announced as 52 yeas to 36 nays. By the lack of seven votes, at the end of twelve years of effort, 'the opportunity once more to throw America's weight into the scale in favor of peace' was rejected.

To what was this decision due? Editorial comment attributed it mainly to three influences: to the impact made upon election-minded Senators by scores of thousands of telegrams inspired by Father Coughlin's passionate and irresponsible oratory;<sup>1</sup> to the tirades of the

<sup>1</sup> By no means without significance was the press report that immediately after the announcement of the vote, without waiting for recess or adjournment, fourteen Senators left the Chamber to telephone 'Three cheers and congratulations!' to Father Coughlin.

It is an interesting coincidence that in the body which gave this decision by a vote of 52 to 36 rejecting the resolution of adherence there survived only 32 (precisely one-third of its membership) from the Senate which in that Chamber, almost nine years before to a day, Jan. 27, 1926, had by a vote of 76 to 17 adopted the resolution of

Hearst press; and to a reluctance to submit our controversies to adjudication in a court concerned for the most part with problems in which the United States has no direct interest, and manned by judges mostly chosen from countries which have repudiated debts aggregating many billions of dollars owed to the United States.

It is the observation of actions and inactions such as these that has led one publicist, informed by four years of Cabinet service, to this conclusion:

The fact is that the treaty-making machinery of the United States has become so complicated as to be almost unworkable. Only by the exercise of great powers of conciliation or of domination by the President, or by awakening and directing upon the Senate a vigorous public opinion, can any progress be made in international relations. A body of ninety-six men of such diverse characteristics and opinions as the members of the Senate is almost hopeless as an Executive force. But it is ideal for purposes of obstruction. If the United States is to move in helpful co-operation with the other nations of the world toward the attainment of international peace, it will only be through the expression of a widespread and strongly expressed public opinion, which the Senate may apprehend is to be translated into votes.<sup>1</sup>

In treaty-making the Constitution of the United States has associated the President and the Senate in positions of such independence that constant friction and frequent deadlocks are inevitable, unless they each recognize that loyalty to a common master constrains them to act together in courtesy and comity to gain for their country, not only security, but that position of moral leadership among the nations to which her people believe her entitled. It should be a matter, not of encroachment, but of co-operation. No President of sagacity would fail to ponder well a resolution expressive of the Senate's opinion on a matter of foreign policy. If the statement were cool-headed and non-partisan, it might give the President a welcome assurance of the lines of negotiation along which he could proceed with confidence.

adherence with its 'impossible' conditions and understandings. In that earlier vote 25 of these Senators had voted *yea* and only 7 had voted *nay*. In the 1935 vote, the seven who had voted *nay* stood fast; but eight who had voted *yea* shifted to the other side — Gerry, Metcalf, Norbeck, Norris, Smith, Trammell, Walsh, and Wheeler.

<sup>1</sup> G. W. Wickersham, *op. cit.*, 192. The most immediate and obvious reaction to such an 'expression of a widespread and strongly expressed public opinion' is likely to be the authorization by the Senate of a select committee to investigate 'pernicious propaganda,' after the manner of the committee that in January, 1924, attempted to expose the malign activities associated with the 'Bok Peace Plan.'

It might be well if state electorates would recognize more often the availability for valuable service in the Senate of men who have borne the responsibilities of a Cabinet position, particularly that of Secretary of State. There is merit in John Bigelow's suggestion that our ex-Presidents be given seats without votes in the Senate. In the discussion of treaties and problems of foreign policy — as he pointed out years ago<sup>1</sup> — it is bad economy for the United States not to avail itself of the experience accumulated by these men while carrying the burden of the Presidency. They have had an opportunity to get an understanding of some most important phases of foreign relations not open to members of the Senate.

That certain Senators — for example, the majority leader and the Chairman of the Committee on Foreign Relations — together with some representative members of the House should be made members of the Cabinet or should have seats with the Cabinet in its discussion of foreign affairs is a suggestion little likely to meet with favor.<sup>2</sup> Not only would such an innovation run directly counter to the traditional separation of powers, but the friction which would be developed by the injection of these *ex-officio* consultants — it may be of a different party — into the circle of intimate advisers of the President's personal choice would certainly neutralize any good to be anticipated.

But that there should be sought an increase of opportunities for informal conference between the Executive and the Senate in matters, like treaty-making, where they have a common responsibility for the

<sup>1</sup> John Bigelow, *Our Ex-Presidents: What Shall We Do For Them? What Shall They Do For Us?* (New York, 1906). Ex-Governor Alfred E. Smith, Democratic candidate for President in 1928, is reported to have made the suggestion that the 'runner-up' for the Presidency be sent to the Senate.

<sup>2</sup> Quincy Wright, *op. cit.*, 371. A promising innovation, looking toward closer co-operation with the Executive, was introduced by Senator Borah, only a few weeks after he became Chairman of the Committee on Foreign Relations. Some Senators feared that the pending commercial treaty with Germany would nullify a part of the Merchant Marine Act. Instead of reporting the treaty to the Senate with an amendment, with the approval of the committee, Chairman Borah appointed a subcommittee of three members to confer with the Secretary of State, urging that a modification of the convention with Germany be sought. (Press dispatch, Dec. 20, 1924.) As a result of conferences in which the Secretary of State and the Secretary of Commerce took part with members of the committee, the treaty was favorably reported with two reservations satisfactory to the Executive, and the treaty was promptly ratified. It is pleasing to receive this assurance from Professor Charles Cheney Hyde who was Solicitor for the Department of State, 1923-25, at the time when this treaty was ratified (letter to the writer, Feb. 2, 1928): 'To me one of the interesting aspects of treaty-making on the part of the United States as it is today undertaken, is the close co-operation between the members of the Senate Committee on Foreign Relations of both political parties, and the Secretary of State. Consultations are frequent, and there is every disposition to put a treaty in such form and give it such character as will eliminate reasonable ground for objection.'

result of their joint labors, seems clear to nearly everyone outside of the Senate Chamber.<sup>1</sup>

[Chief-Judge Hughes deplored] the separateness of the Executive power under our system [which has] deprived the Executive of opportunities open to parliamentary leaders of participation in parliamentary debate.... There are complicated states of fact which cannot be understood without an intimate knowledge of historical background and a painstaking and discriminating analysis of material. There are situations of controlling importance which are wholly unknown to the general public and which cannot be appreciated without the special information available only to officers of the Government.... The Secretary of State, acting for the President may negotiate an important treaty, but he has no opportunity to explain or defend it upon the floor of the Senate when its treaties are under debate.... I do believe in multiplying the facilities for appropriate co-operation between responsible leaders who understand their respective functions in a manner suited to the full discussion of great international questions when these fall within the Constitutional competency of the Senate. To enable Cabinet officers to vote in either House of Congress would require a Constitutional amendment, and I should not favor it, but it is quite consistent with our system that the head of a department should have the opportunity personally to be heard where important department measures and policies are under consideration.<sup>2</sup>

No man has ever laid greater stress upon the desirability of co-operation in treaty-making than did Woodrow Wilson. In a study of *Constitutional Government in the United States*, published only two years before he became President, upon this point he said:

The policy which has made rivals of the President and Senate has shown itself in the President as often as in the Senate, and if the Constitution did indeed intend that the Senate should in such matters be an executive council, it is not only the privilege of the President to treat it as such, it is also his best policy and his plain duty. As it is now, the President and the Senate are apt to deal with each other with the formality and punctilio of powers united by no common tie except the vague common tie of public interest, but it is within their choice to change the whole temper of affairs in such matters and to exhibit the true spirit of the Constitution by coming into intimate relations of mutual confidence, by a change of attitude which can perhaps be effected more easily upon the initiative of the President than upon the initiative of the Senate.<sup>3</sup>

<sup>1</sup> Even Henry Cabot Lodge acknowledged that 'to hold no consultation with a body of constitutional advisers about nominations and treaties upon which they have the power to put an absolute veto would be at once dangerous and absurd.'

<sup>2</sup> Commencement Address, at the University of Michigan, June 19, 1922.

<sup>3</sup> *Constitutional Government in the United States* (ed. of 1911), 140.

How far President Wilson's practice in treaty-making came to differ from his earlier theory and intent, the world knows. As to the Treaty of Versailles, his explanation doubtless would have been that the circumstances of its negotiation with the plenipotentiaries of many other powers put it out of the range of ordinary treaties, and made impossible continuous 'confidential communication while his plans were in course.'<sup>1</sup> Nevertheless, it is to be remembered that as soon as the draft of the League of Nations Covenant was completed at Paris — before it had even been read to a plenary session of the Conference — he arranged by cable an opportunity to discuss it clause by clause with the Senate and House Committees which had to do with foreign affairs,<sup>2</sup> and that later in submitting the actual treaty to the Senate he expressed the hope that the Senate or its Committee on Foreign Relations would not hesitate to make use of his services and all the information he possessed.<sup>3</sup> Yet, before the President and the Committee on Foreign Relations came together in informal conference, there had intervened nearly seven weeks. During this time, 'while a great number of witnesses were called for the purpose of condemning or criticizing the treaty, no witnesses were called and no testimony sought to elucidate or explain the great purpose of international co-operation to prevent war.'<sup>4</sup>

This uncordial attitude toward the advances made by the President was not due merely to pique at his having failed to keep the Senate in touch with the negotiations, nor to disapproval of the treaty which had been negotiated. It was due also in considerable degree to the

<sup>1</sup> Page 696.

<sup>2</sup> Feb. 14, 1919; *Cong. Rec.*, LVII, 3689.

<sup>3</sup> July 10, 1919; *ibid.*, LVIII, 2336.

<sup>4</sup> Senator P. J. McCumber, 66th Cong., 1st sess., S. Rept. 176, part 3. As early as July 17, the President began a series of conferences with individual Senators, who at his invitation came to the White House to discuss 'the treaty and all that it involves.' Even such conferences provoked criticism. (Letter of invitation, *Boston Herald*, July 18, 1919.) Senator Lodge indicated his attitude against White House conferences, and also intimated that the Committee on Foreign Relations would not, as Senator Hitchcock had urged, invite the President to appear before it. He declared: 'No Committee of Congress has any right, or ought to have any right, to summon the President of the United States before them, and no suggestion has been made that they do so. The ground which Madison took, that he could not receive officially a committee of the Senate . . . has always seemed to me the absolutely correct ground.' Nevertheless, at a meeting of the Committee on Foreign Relations, held a month later (Aug. 14), he was authorized to request the President to inform the committee whether he would receive its members at such time and place as might be convenient to him in connection with the treaty, and in response to the letter thus written the President at once requested Senator Lodge to invite the members of the Committee to meet with him at the White House, Aug. 19, 1919, at 10 A.M. (C. F. Redmond, Clerk of Committee on Foreign Relations, letter of June 24, 1924.)

Senate's traditional stiffness and jealousy in insisting upon exercising an entirely independent judgment upon foreign relations and putting its individual stamp upon every important treaty that is made. Many years before, on the floor of the Senate, in referring to that part of a standing rule of the Senate which still makes provision for the formalities to be observed when the President meets with the Senate for the consideration of executive business, Senator Lodge had said: 'Yet I think we should be disposed to resent it, if a request of that sort was made to us by the President';<sup>1</sup> and in the same debate he had cited with approval President Madison's refusal to meet with a committee of the Senate on the ground that in the making of appointments and treaties his relations were exclusively with the Senate, and not with one of its committees.<sup>2</sup>

It is clear that President Washington entertained no such theoretical or practical objections; there are repeated instances of his conferring with committees of the Senate, for the consideration of executive business. While a President may properly decline to recognize any right of the Senate to summon him to the Senate Chamber or to meet with one of its committees, it does not follow that the President and a Senate committee cannot come together in an informal conference for which he has opened the way, without impairing the dignity and prestige of the Senate. The suggestion that in such a personal conference a body of the traditions of the Senate's Committee on Foreign Relations would be so overawed by the President as to lose its independence of judgment is to the highest degree preposterous. Witness, the White House conference over the League of Nations! It should be no less preposterous to assume that in such personal conference with the President, who knows all the intricacies of the negotiation, open-minded Senators might not secure highly valuable light upon the treaty problem awaiting their decision.

Although the Senate's concurrence has often been difficult to obtain and in many cases has led to the delay or failure of treaties, those

<sup>1</sup> Jan. 24, 1906, *Cong. Rec.*, XL, 1470.

<sup>2</sup> Jan. 23, 1906, *ibid.*, 1420.

It is said that President Cleveland in 1896 met the House Committee on Foreign Affairs and satisfied its members as to his attitude upon Cuban belligerency. (L. G. McConachie, *Congressional Committees*, 227.) Ex-President Roosevelt requested an opportunity to appear before the Senate Committee on Foreign Relations, to present his reasons for the opinion that the Colombian Treaty should not be ratified. But a recent Chairman of that Committee, Senator Borah, has assured the writer that its files do not record his having appeared; nor do the files substantiate the statement that Wu Ting Fang once appeared before the committee to discuss a House bill relating to Chinese exclusion.

which receive its consent carry with them the nation's pledge. Senator Lodge proudly asserted:

In the observance of treaties during the last one hundred and twenty-five years there is not a nation in Europe which has been so exact as the United States, nor one which has a record so free from examples of the abrogation of treaties at the pleasure of one of the signers alone.<sup>1</sup>

Whatever satisfaction may be found in the record of the United States' fidelity in the observance of treaties, nevertheless the controversies between Senate and President, the delays and the uncertainties which inevitably in recent years have developed over the ratification of nearly every treaty with a major power and especially over multilateral agreements for the purpose of assuring peace — these are giving rise to serious misunderstandings and distrust.

America has never yet devised a sound or efficient technique of diplomacy.... Nearly every important treaty the country has been called upon to make has become a bone of contention between the Executive and the Senate. It is certain that in years to come if we are to go forward in the new paths and stand for a clear-cut world policy, we must devise some method of speaking to the world promptly and with an undivided voice. Our present system leads to utter weakness, muddle and delay; it forces both sides to play politics, and instead of meeting the issue squarely, to indulge in a vast controversy over the prerogatives of two co-ordinate branches of the Government. The deadlock between the Executive and the Senate every time we face a really critical foreign problem is intolerable. It not only disgraces us before the nations, but in some future world crisis may ruin us.<sup>2</sup>

<sup>1</sup> *A Fighting Frigate*, 256. In his posthumous book (*The Senate and the League of Nations*, 5), Lodge admitted that at the time of the enactment of the Panama Canal Tolls law 'the United States has fallen into an unfortunate and unhappy position, where she has incurred the active dislike of many nations and the distrust of many more, instead of the friendship and respect which she once possessed.' There is here no suggestion that the Senate — or that he, personally — had had any part in causing this dislike and distrust of the United States which had developed between 1902 and 1925, the dates of these two statements.

<sup>2</sup> Ray Stannard Baker, *Woodrow Wilson and World Settlement*, I, 316-17.

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# XIII

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SENATE 'ADVICE AND CONSENT' TO APPOINTMENTS

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The President shall nominate, and by and with the consent of the Senate, shall appoint . . .

CONSTITUTION OF UNITED STATES

It will be the office of the President to *nominate*, and with the advice and consent of the Senate to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senators. They may defeat one *choice* of the Executive, and oblige him to make another; but they cannot themselves *choose* — they can only ratify or reject the choice of the President.

ALEXANDER HAMILTON (*Federalist*, LXVI)

In the matters of recommendation, and, indeed, of obtaining office, it is leg-muscle and lack of modesty which win, rather than fitness and character. . . . The appointing power is in effect in the Senators' hands, subject only to a veto by the President.

EX-PRESIDENT WILLIAM H. TAFT

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# XIII

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## SENATE 'ADVICE AND CONSENT' TO APPOINTMENTS

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### THE PRESIDENT NOMINATES

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UNTIL within a few weeks of the final adjournment of the Federal Convention it seemed settled that the exclusive power to 'appoint Ambassadors and other public Ministers and Judges of the Supreme Court' was to be assigned to the Senate.<sup>1</sup> Not until the election of the President had been taken from the Legislature and assigned to independent electors, and not until a still lingering fear that the 'ultimate choice' of President by the Senate might make the President 'the minion of the Senate' had been removed by shifting that choice to the House, were the delegates ready to assign to the Executive the power to nominate and, by and with the advice and consent of the Senate, to appoint the principal officers of the United States. This arrangement, in the opinion of Gouverneur Morris, would assure responsibility through nomination by the President and security through the Senate's concurrence.<sup>2</sup>

The First Congress had been in session only a few weeks when President Washington met the committee which had been named by the Senate to confer with him upon the proper mode of communication between the President and the Senate in relation to treaties and nominations. Although he found that all members of the committee favored the President's presenting his nominations in person, he declared to them his own opinion that the nominations 'had best be

<sup>1</sup> Report of the Committee of Detail, Aug. 6. Madison, *Debates*, 342, 459.

<sup>2</sup> *Ibid.*, p. 529.

made by written messages. In this case the acts of the President and of the Senate will stand upon clear, distinct, and responsible ground.' He was convinced that oral communication could not fail to cause embarrassment to the President and constraint to the Senators. In accordance with his suggestion the committee reported to the Senate in favor of leaving to the President in each case choice of the mode and place of communication.<sup>1</sup> From that day to this, with but a single exception, succeeding Presidents have followed Washington's precedent and communicated nominations by written message. March 4, 1921, President Harding went from the inauguration ceremony directly to the Senate Chamber, and in person presented nominations for positions in his Cabinet, 'commending the qualities of each to the members of the Senate.'<sup>2</sup> It had the character of a 'family affair,' for not only was the President addressing his former colleagues, but he was presenting the names of two of their number for confirmation.

From the outset President Washington anticipated that the exercise of the appointing power would prove 'one of the most difficult parts of the duty of his office.'<sup>3</sup> A few months later he declared this to be 'the most irksome part of the executive trust.' No President ever approached the task with greater singleness of purpose. The advances of relatives seeking office met with chilling discouragement. He declared that nothing beyond testimonials with respect to abilities, integrity, and fitness would be of any avail in his decisions.<sup>4</sup> An intimate personal friend applied to him for a lucrative office. No one doubted that he would receive it. A political enemy applied for the same position, and, although everyone marveled at his presumption, he got the nomination. To a friend who remonstrated with the President at this choice Washington replied:

My friend I receive with cordial welcome; he is welcome to my house and welcome to my heart, but, with all his good qualities, he is not a man of business. His *opponent* is, with all his politics so hostile to me, a man of business; my private feelings have nothing to do in this case. I am not George Washington, but President of the United States. As George Washington, I would do this man any kindness in my power; as President of the United States, I can do nothing.<sup>5</sup>

<sup>1</sup> Pages 55-56.      <sup>2</sup> David S. Barry, *Forty Years in Public Life*, 272.

<sup>3</sup> *Writings*, X, 3. Letter to Edward Rutledge, May 5, 1789.

<sup>4</sup> *Ibid.*, 6. Letter to Mary Wooster, May 21, 1789; *ibid.*, 23. Letter to Bushrod Washington, July 27.

<sup>5</sup> Niles's Register, XX, 249. Quoted by Professor Salmon, *History of the Appointing Power of the President*, 27.

To Madison and Monroe, who came to him as a committee representing a caucus of Republican representatives and Senators to urge the appointment of Burr as Minister to France in 1794, Washington declared that it had been the rule of his public life never to nominate for a high and responsible office a man of whose integrity he was not assured. On that ground he declined to nominate Burr, and, when the committee returned to urge upon him the caucus's resolution to adhere to the choice of Burr, with irritation the President declared that his decision was irrevocable.<sup>1</sup> He recognized that the personnel of the Administration ought to be representative of the whole country. 'My aim,' he declared, 'has been to combine geographical situation and sometimes other considerations with abilities and fitness of known characters.'<sup>2</sup> He chose the members of his Cabinet from five states and Justices of the Supreme Court from seven.

In seeking to inform himself as to the qualifications of possible nominees, in the early months of his service Washington aroused some criticism by taking counsel with members of the House.<sup>3</sup> Perhaps to allay senatorial jealousy, he later pursued a different policy. Upon receiving from North Carolina a list of recommendations for filling the revenue offices in that state, he recorded in his diary: 'Submitted the same to the Senators of that State for their inspection and alteration.'<sup>4</sup> Later Presidents have pursued diverse policies in securing advice before making nominations. President McKinley, at the beginning of his service, practically gave it to be understood that applications were to come to him through the hands of the Senators from the states in which the positions were sought, and President Harding definitely committed himself to that policy. President Wilson, on the other hand, the day after his inauguration issued a formal statement, announcing that he regretted to be obliged to decline to see applicants for office in person except when he himself should invite the interview. It was his intention to deal with appointments through the heads of the several departments.<sup>5</sup> Still others have assigned the task of the

<sup>1</sup> Parton, *Life of Aaron Burr*. The President added apologetically, 'I will appoint you, Mr. Madison, or you, Mr. Monroe.' The caucus instructed the committee to go to the President a third time and say that they would make no other recommendation than Burr. This message was given to the Secretary of State, who declined to deliver it to the President. Monroe was finally nominated.

<sup>2</sup> *Writings*, XI, 78.

<sup>3</sup> Maclay, *Journal*, 122, Aug. 10, 1789.

<sup>4</sup> Feb. 15, 1790, *The Diary of George Washington*, 1789-91 (edited by B. J. Lossing), 88.

<sup>5</sup> J. Kerney, *The Political Education of Woodrow Wilson*, 30.

preliminary 'thinning out' of applications to a personal secretary or to some unofficial party Nestor.<sup>1</sup>

To the question what scope should be given to the Senate's advice and consent, President Washington gave not a little anxious thought. He sought advice, and weighed it carefully. In his diary he recorded (April 28, 1790):<sup>2</sup>

Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons on the Diplomatic line & Consuls; and with respect to the grade of the first — His opinion coincides with Mr. Jay's and Mr. Jefferson's — to wit — that they have no Constitutional right to interfere with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being executive and vested in the President by the Constitution.

In the Senate there was a strong disposition to assert control over decisions of this kind. Thus, when the President, December 22, 1791, sent in the nominations of Ministers to represent the United States at Paris, London, and The Hague, consideration of the nominations was

<sup>1</sup> How a 'business executive' handles patronage problems was indicated by several innovations in the early days of President Hoover's Administration. March 26, 1929, he issued a statement, specifically designating three Southern States from which the recommendations for office from the old Republican organizations had been such as to render it impossible for those organizations to command the confidence of the Administration. 'Such conditions are intolerable to the public service, are repugnant to the ideals and purposes of the Republican Party, are unjust to the people of the South and must be ended.' He warned the Republicans of the Southern States that unless they could initiate organization for the recommending of nominations for federal positions through the leadership of men who would command confidence and protect the public service, advice as to the selection of federal employees would have to be secured by other methods. A month later it was announced that the reorganization of advisory committees in three of the Southern States was going forward under the direction of the President's loyal friends, headed by the Postmaster-General. When some of the old-line leaders complained that their suggestions for appointments were being ignored, and openly threatened that the President would lose the support of their states, he made public his reply, addressed to one of his critics, declaring that the men they had suggested had not been nominated because they were found unqualified, he quoted from his warning statement of March 26, and added: 'This was no idle gesture.' April 18, 1929, President Hoover, in announcing nominations of eleven federal judges, made public the lists of their endorsers. This innovation not only made the sponsors share the responsibility of the nominations, but it was calculated to stop the double-dealing of many politicians who secretly endorse several men for the same office. The *New York Times* (Dem.) commented: 'He has acted only on the advice of the Attorney-General, of the bar associations, and of other distinguished and impartial sponsors for the new judges.' (April 19, 1929.)

<sup>2</sup> *Diary*, 128. For further evidence of his concern over this matter, see Jefferson's reply, April 24, 1790, to Washington's inquiry (Appendix A, *Works of John Adams*); also, the abstract of debate in the Senate, Dec. 30, 1791, 'Of the Agency the Senate Ought to Have in Judging of the Expediency of Sending Ministers Abroad.' Washington, *Writings*, X, 479-83.

postponed from day to day while the Senate debated a resolution which finally took the form: 'That the Senate do not possess evidence to convince them that it will be for the interests of the United States to appoint Ministers Plenipotentiary to reside permanently at foreign courts.'<sup>1</sup> After weeks of delay, on the ground of a special need for representation at these three capitals, by a narrow vote the Senate advised and consented to each of the appointments.

President Washington's realization of the importance of this test of opinion in the Senate is evidenced by an abstract of the debate in his own handwriting. He had already assumed that it was within his own power to appoint and to instruct executive agents for important missions without seeking the Senate's advice or consent.<sup>2</sup>

In sending his very first nomination to the Senate June 15, 1789, President Washington wrote: 'For this purpose I nominate William Short, Esq., and request your advice on the propriety of appointing him.'<sup>3</sup> This conciliatory letter of transmittal was accompanied by the statement: 'I have directed the Secretary of Foreign Affairs to lay before the Senate, at such time as you may think proper to assign, papers which will acquaint you with his character.' In this case, at the Senate's request, Secretary Jay in person laid these papers before the Senate, and the following day by ballot the Senate consented to the appointment. Washington's later nominations were submitted with less ceremony, nor were they ordinarily accompanied by papers setting forth the nominee's qualifications. Yet, although in conference with a committee of the Senate, he had said that 'the President has a right to nominate without assigning his reasons,' even in his caustic message after the rejection of the Fishbourn nomination, he declared that when the Senate doubted the propriety of his nominations, he would with pleasure lay before it the information which had led him to make them.<sup>4</sup> Later contests between Presidents and the Senate over appointments would have been more rare if Washington's successors had made their choices with his conscientious discrimination. During his eight years of service the Senate withheld its consent to only five of his nominations.<sup>5</sup>

<sup>1</sup> Jefferson wrote to Pinckney, Feb. 17, 1792: 'Some members of the Senate, apprehending that they had the right to determine on the *expediency* of foreign missions, as well as on the *persons* named, took that occasion of bringing forward the discussion of that question, by which the nominations were delayed two or three weeks.' *Works*, III, 329.

<sup>2</sup> Pages 68-69.

<sup>3</sup> Senate *Executive Journal*, 6 and 7.

<sup>4</sup> Page 54.

<sup>5</sup> C. H. Kerr, *op. cit.*, 110.

It was not to be expected that in the exercise of the power of appointment John Adams's relations with the Senate would be comfortable. It was well known that he disapproved of the Constitution's linking the Senate with the President in the executive powers;<sup>1</sup> from the Vice-President's chair he had lectured the Senate as none of his successors has ventured to do; his diary and letters contain not a few disparaging remarks as to the capacity and judgment of 'numerous bodies' in general,<sup>2</sup> and of the Senate in particular, for acting with the discrimination essential to the successful making of treaties and appointments. Moreover, he found the Senate controlled by Federalists so devoted to their leader that the President could not 'name a man not devoted to Hamilton without kindling a fire.'<sup>3</sup> Political bias, and even personal favoritism, were not so rigidly excluded from consideration by Adams as they had been by Washington.<sup>4</sup> Jefferson, a far more tactful politician, and head of the party in control in the Senate, encountered less opposition to his nominations than did Adams. Although he had far more offices to fill than did his predecessor, the number of rejections was much smaller.

In the First Congress, when hardly more than a score of Senators met daily in secret session, the problem of informing themselves as to the qualifications of nominees was comparatively simple. Says Maclay:

I have made objections... to giving my advice and consent to the appointment of men of whom I knew nothing. Izard got to the same

<sup>1</sup> In the summer of 1789 two of the foremost statesmen of that day exchanged views upon 'The Negative of the Senate upon Appointments to Office.' John Adams, who was then presiding over the Senate in its first session, under eight heads vigorously assailed this blending of the executive and legislative powers, while Roger Sherman, who had had an important part in the work of the Federal Convention, and who was soon to enter the Senate, strongly defended that feature of the Constitution. After a century and a half of American political experience, this 'debate' between two such sturdy but friendly opponents well merits an attentive reading. Adams, *Writings* (1851), VI, 433-36; 439-42.

In response to a letter from Jefferson (Paris, Nov. 11, 1787, *Works*, 1829 ed., II, 266), criticizing some features of the Constitution before it had been ratified, John Adams replied (*Works*, VIII, 464): 'The nomination and appointment to all offices I would have given to the President, assisted only by a council of his own creation; but not a vote or a voice would I have given to the senate or any senator unless he were of the privy council.' G. W. Pepper (*Family Quarrels*, 86, n. 18) wrongly attributes this comment to Jefferson.

<sup>2</sup> He declared that the Congress under the Confederation had been 'torn to pieces by disputes over appointments of general officers and foreign ministers. Days and months and years were wasted in such controversies, to the inexpressible injury of the service. To these causes are to be attributed almost all the disasters of the War. No, the real fault is that the President has not influence enough and is not independent enough.' *Writings*, V, 538.

\* *Ibid.*, IX, 301-02.

<sup>4</sup> *Life of Timothy Pickering*, III, 465; Carl R. Fish, *The Civil Service and Patronage*, 24-26.

subject and bounced a good deal. However, the thing was got over by the members rising and giving an account of the officers appointed from the different states, and all agreed to.<sup>1</sup>

Not infrequently Senators appealed to Representatives from their own states for more detailed information. Some years later Plumer told of a member's calling upon the Massachusetts Senators for information as to a nominee from that state. Senator John Quincy Adams replied that he 'knew Mr. A., but should say *nothing* of him.' Whereupon 'almost every democrat voted in his favor.'<sup>2</sup>

Early in the Senate's history through the party caucus pressure was exerted to effect appointments. Thus, it was by a joint caucus of Republican Senators and Representatives that a committee consisting of Madison and Monroe was thrice instructed to urge upon Washington the appointment of Burr as Minister Plenipotentiary to Paris in place of Gouverneur Morris.<sup>3</sup> Under Jefferson the party caucus in the Senate was active to secure confirmation for the Administration's nominees. Opposition to the appointment of Claiborne to be Governor of Orleans had at first been very strong:

But at a private caucus it was resolved by the Democrats to agree to it. After the Senate was adjourned, the Vice-President (Burr) observed at the fire that the Senate had agreed to advise to the appointment of Claiborne when not a single Senator believed he was qualified for the office. And Gen. Bradley said that the President's dinners had silenced them, and that Senators were becoming more servile.<sup>4</sup>

Occasionally committees appointed, not by a caucus but by the Senate itself, were sent to confer with a President as to specific nominations. A committee of five, appointed by the Senate to consider and report on the nomination of William Vans Murray to be Minister Plenipotentiary to the French Republic, sought a conference with President Adams, which was granted 'under the protestation that it should not be mentioned in the report, nor considered as a precedent.' The President declared that he would neither withdraw nor modify the nomination, saying repeatedly that to defend the Executive against oligarchic influence, it was indispensable that he should insist on a decision on the nomination. He intimated that if Murray were negatived he would then appoint instead a commission of three to handle the proposed negotiations. When this was reported back to the

<sup>1</sup> *Journal*, 282.

<sup>2</sup> William Plumer, *Memorandum*, 220–21, Dec. 11, 1804.

<sup>3</sup> Page 725.

<sup>4</sup> Plumer, *Memorandum*, 221.

Federalist caucus, it was agreed to reject Murray's nomination.<sup>1</sup> Referring to this experience Adams wrote:

I soon found that if I had not the previous consent of the heads of the departments and the approbation of Mr. Hamilton I ran the utmost risk of a dead negative in the Senate. One such negative, at least, I had after a very formal and a very uncivil remonstrance of one of their large, unconstitutional committees in secret.<sup>2</sup>

But in his message of February 25, 1799 — before the committee had reported to the Senate — referring to 'many manifestations of the public opinion' which had led him to conclude that 'a new modification of the embassy will give more general satisfaction to the legislature and to the nation,' he substituted for his previous nomination of Murray the names of Ellsworth, Henry, and Murray to be Envys Extraordinary and Ministers Plenipotentiary to the French Republic, with full powers to negotiate a treaty for the settlement of all controversies between the United States and France.<sup>3</sup>

With some hesitation, Madison reached the decision to put an end to such conferences. The chairman of the Senate committee, authorized to 'inquire into and report on' the nomination of Albert Gallatin as one of the envoys to treat with Great Britain and Russia, called upon the President by appointment, but was then informed by him that he did not consider the authority given to the committee by the resolution such as 'to authorize them to call on *him*, in their official character'; but that, if they were especially instructed to call upon him, and the specific object should be designated, he would freely receive them. When this reply was reported to the Senate, that body forthwith passed a resolution that the pending nomination of Jonathan Russell as Minister Plenipotentiary to Sweden, and the motion that 'it is inexpedient at this time to send a Minister Plenipotentiary to Sweden,' be referred to a committee, with instructions to confer with the President of the United States upon the subject of the said nomination and report thereon.<sup>4</sup> Two days later the Senate passed a resolution declaring that, 'in the opinion of the Senate, the powers and duties of the Secretary of the Department of the Treasury, and those of an Envoy Extraordinary to a foreign power, are so incompatible, that they ought not to be, and remain united in the same person'; and the Senate instructed the committee on Gallatin's nomination to

<sup>1</sup> Sedgwick to Hamilton, Hamilton's *Works*, edited by J. C. Hamilton, VI, 399.

<sup>2</sup> Adams, *Writings*, IX, 301–02. • *Messages*, I, 316.

<sup>4</sup> Senate *Executive Journal*, June 14, 1813, II, 354.

'communicate this resolution to the President of the United States, and respectfully to confer with him upon the matter thereof.'

Thereupon President Madison sent a message to the Senate in which he set forth his views as follows:

The Executive and the Senate in the cases of appointments to office, and of treaties, are to be considered as independent of and co-ordinate with each other. If they agree, the appointments or treaties are made. If the Senate disagree, they fail. If the Senate wish information previous to their final decision, the practice . . . has been either to request the Executive to furnish it, or to refer the subject to a committee of their body, to communicate either formally or informally, with the head of the proper department. The appointment of a committee of the Senate to confer immediately with the Executive himself appears to lose sight of the co-ordinate relation between the Executive and the Senate, which the Constitution has established, and which ought therefore to be maintained.

By analogy he suggested that were a committee appointed by one branch of Congress to confer with the entire body of the other, 'the objection to such a conference, being against the principle, as derogating from the co-ordinate relations of the two Houses, would retain all its force.' He added that the Senate would be 'cheerfully furnished with all the suitable information in possession of the Executive, in any mode deemed consistent with the principles of the Constitution, and the settled practice under it.'<sup>1</sup> When the committee on the Gallatin nomination requested a conference with the President, he made an appointment, but in so doing apprized the committee of his recent message to the Senate. The committee, nevertheless, 'deemed it an incumbent duty to wait upon the President, . . . and to present to him both the resolutions of the Senate.' They did so. Their report of that chilling interview runs thus:

The President was pleased to observe to the committee, in substance, that he was sorry that the Senate had not taken the same view of the subject which he had done; and that he regretted that the measure had been taken under circumstances which deprived him of the aid and advice of the Senate. After the committee had remained a reasonable time, for the President to make any other observations, if he thought proper to do so, and observing no disposition manifested by him to enter into further remarks, the committee retired, without making any observations on the matter of the resolutions, or in reply to those made by the President.<sup>2</sup>

<sup>1</sup> Senate *Executive Journal*, II, 381.

<sup>2</sup> *Ibid.*, 389.

Senator Lodge repeatedly expressed approval of this precedent, in which, in his opinion, President Madison enunciated 'the correct doctrine.' On the other hand, Senator Rufus King, a veteran member of the Federal Convention, wrote a long 'Defense of the Senate,' in which he characterized Madison's construction of the Constitution as 'unsound, contrary to original usage, and inconvenient to the useful discharge of the duties of the President and Senate.'<sup>1</sup> He referred to Washington's not having considered it beneath his dignity repeatedly to confer with a committee of the Senate, and to the fact that Presidents always received a joint committee of the Senate and House at the beginning and end of a Congress, nor did they scruple to meet party committees made up of members of the Senate and House. He declared the committee method the most feasible, now that the Senate had increased to a size making the whole body unwieldy for conference. Madison's insistence that the Senate should confer, not with the President but with heads of departments, King declared was 'wholly inadmissible, and tended to degrade the Senate,' the heads of departments being 'mere will and pleasure officers of the executive.' He insisted that the Senate through committee conference with the President had sought for information needed for their guidance and obtainable only from the President, and ridiculed the idea that the power of the President could be 'controlled' by such a conference.<sup>2</sup>

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#### SENATORS' PRESSURE FOR PATRONAGE

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In the first three decades under the Constitution, the list of federal office-holders made no portentous growth. Presidents exercised the power of removal with what seemed to their successors of the next generation astonishing restraint. From time to time friction developed between the President and the Senate, and there was severe denunciation, for example, of the 'unseemly haste' with which John Adams, in the three months after Jefferson's election was assured, filled the avail-

<sup>1</sup> *Life and Correspondence of Rufus King* (edited by C. R. King), V, 311.

<sup>2</sup> *Ibid.*, 324-37.

able positions with the 'most ardent political enemies' of the President-elect.<sup>1</sup>

In 1810, Representative Macon introduced an amendment to the Constitution, providing that no member of the Senate or of the House should be appointed to any civil office or employment, under the United States, until the expiration of the presidential term in which such person should have served as Senator or Representative. While this would have limited somewhat the President's range of choice, its prime object seems to have been neither to lessen the President's power nor to secure greater efficiency in the civil service, but to 'guard against a political danger.' Macon believed that a separation of powers was of fundamental importance in the Constitution, and in the growth in the number of appointees he and his associates saw a breaking-down of that principle. The dominant influence exercised by the congressional caucus in the selection of presidential candidates seemed to be making more inevitable this 'consolidation which has grown and is strengthened under the influence of the office distributing power, vested in the Executive.'<sup>2</sup> In the words of Josiah Quincy, 'So long as this condition of things continues, what ordinary executive will refuse to accommodate those who in so distinguished a manner have accommodated him?'<sup>3</sup> Macon's logic and Quincy's eloquence secured for this proposal a substantial majority in the House, but not the two-thirds required for a constitutional amendment.<sup>4</sup>

In 1820, an Act was passed which greatly increased the number of appointments to be made. This came to be known as the Four Years' Law.<sup>5</sup> For the first time this Act established a fixed term of four years for district attorneys, collectors of customs, and a great number of other officers, all of whose tenure had hitherto been at the pleasure of the President. A modern critic said of its enactment:

In silence almost stealthily, this Act, working a revolution in our official system, . . . was carried through both Houses. . . . There was no showing of delinquency, no charges that the President could not or

<sup>1</sup> Letter to Mrs. Adams, June 13, 1804; Jefferson's *Works* (1854), IV, 546; Dec. 20, 1810, *Annals of Congress*, 453.

<sup>2</sup> *Annals of Congress*, 841, 846. Quoted by C. R. Fish, *The Civil Service and the Patronage*, 57.

<sup>3</sup> *Annals of Congress*, 852, Jan. 20, 1811; Edmund Quincy, *Life of Josiah Quincy*, 222.

<sup>4</sup> The vote stood 71 to 40 — not 59 to 65 as stated by Professor Salmon, confusing the vote upon the resolution with that upon a ruling by the Speaker. *Annals of Congress*, 899.

<sup>5</sup> Act of May 15, 1920.

would not remove unworthy officials, not a word of debate, not a record of votes on this revolutionary and disastrous bill.<sup>1</sup>

John Quincy Adams, a contemporary, wrote:

This bill 'was drawn up by Mr. Crawford, as he himself told me.... The Senate was conciliated by the permanent increase of their power, which was the principal ultimate effect of the Act, and every Senator was flattered by the power conferred upon himself of multiplying chances to provide for his friends and dependents.... The result of the Act has been to increase the power of patronage exercised by the President, and still more that of the Senate and of every individual Senator.'<sup>2</sup>

He asserted that, although its ostensible object had been to secure the accountability of these officers, its real and immediate purpose was to promote the election of W. H. Crawford as President in 1824. In Adams's opinion it placed the whole body of executive officers of the general Government throughout the Union at the mercy, for their continuance in office, of the Secretary of the Treasury and of a majority of the Senators. He declared:

Mr. Monroe unwarily signed the bill without adverting to its real character. He told me that Mr. Madison considered it as in principle unconstitutional.... Mr. Monroe himself inclined to the same opinion, but the question had not occurred to him, when he signed the bill.<sup>3</sup>

A careful study of civil service conditions of the time and of Crawford's methods of dealing with the patronage has led Professor Fish to the conclusion that Adams, always ready to impute unworthy motives

<sup>1</sup> D. B. Eaton, *Term and Tenure of Office*, 245. Calhoun declared in 1846 that the limiting of the term of office by this Act had done more toward making a revolution in the United States than almost any other influence. *Cong. Globe*, 819, May 14.

<sup>2</sup> *Memoirs*, VII, 424-25.

<sup>3</sup> Two watchful ex-Presidents were quick to note the dangers which lurked in this law. Jefferson wrote to Madison, Nov. 29, 1820: 'This is a sample of the effects we may expect from the late mischievous law vacating every four years nearly all the executive offices of the government. It saps the constitutional and salutary functions of the President, and introduces a principle of intrigue and corruption, which will soon leaven the mass, not only of Senators but of citizens. It is more baneful than the attempt which failed in the beginning of the government to make all officers irremovable, but with the consent of the Senate. This places, every four years, all appointments under their power, and even obliges them to act on every nomination. It will keep in constant excitement all the hungry cormorants for office, render them, as well as those in place, sycophants to their senators, engage these in eternal intrigue to turn out one and put in another, in cabals to swap work, and make of them all what all executive directories become, mere sinks of corruption and faction.' (*Writings*, VII, 190.) For Madison's reply, see his *Letters and Other Writings*, III, 196.

Madison wrote to President Monroe, Dec. 28, 1820: 'Is not the law vacating the described offices an encroachment on the Constitutional attributes of the Executive?... If a law can displace an officer at every period of four years, it can do so at the end of every year, or at every session of the Senate, and the tenure will then be the pleasure of the Senate as much as of the President, and not of the President alone.' *Ibid.*, 200.

to others, was unduly suspicious as to the purpose of this bill, sponsored by a man who was sure to be a rival in the coming presidential election. This friendly critic is convinced that, though the method was crude, nevertheless, in the then existing conditions this law's requirement of 'a thorough overhauling at definite periods might well have served as a spur to accuracy and promptness' while it would also invigorate the service by dropping the old and incapable without fixing upon them the stain of removal. He thinks it distinctly improbable that Crawford's purpose was to transform this Act into an instrument to secure his own election and to introduce the spoils system.<sup>1</sup>

Disdaining to take advantage of the opportunities which this law presented to him, Monroe adopted the principle of renominating every officer at the expiration of his commission, unless some misdemeanor should be proved against him. In the closing weeks of his Administration the Senate declined to act upon many of his renominations of officers whose terms would not expire before the incoming of the new Administration.

Says Adams:

Efforts have been made by some of the Senators to obtain different nominations, and to introduce a principle of change or rotation in office at the expiration of their commissions, which would make the Government a perpetual and unremitting scramble for office. A more pernicious expedient could scarcely have been devised.... I determined to renominate every person against whom there was no complaint which would have warranted his removal; and re-nominated every person nominated by Mr. Monroe, and upon whose nomination the Senate had declined acting.<sup>2</sup>

At the end of his term Adams could say:

I have re-nominated every officer, friend or foe, against whom no specific charge of misconduct has been brought.<sup>3</sup>

It remained for his successor to test to the limit the political possibilities which this four-year law presented to the President.<sup>4</sup>

<sup>1</sup> C. R. Fish, *op. cit.*, 65-70.

<sup>2</sup> *Memoirs*, VI, 520-21, March 5, 1825.

<sup>3</sup> *Ibid.*, VII, 425, Feb. 7, 1828.

<sup>4</sup> Jackson, who in 1824 had written a letter deprecating party tests for office, made 'removals of twenty times more officials than all who had been removed for any cause since the foundation of the Government.' In his first message he recommended a 'general extension of the law which limits appointments to four years,' and declared 'rotation a leading principle in the Republican creed.' Eaton, *op. cit.*, 26.

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### THE COURTESY OF THE SENATE

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As to the appointing power Hamilton had predicted: 'There will, of course, be no exertion of choice on the part of the Senators.... They can only ratify or reject the choice of the President.' More than a century later, ex-President Taft recorded: 'The appointing power is in effect in their [the Senators'] hands, subject only to a veto by the President.'

This prophecy by Hamilton and this disillusioned statement of fact by ex-President Taft, after four years of experience in appointment-making, stand in utter contradiction. How has this reversal of the real choice come about?

Idealism was not universal in 1789. Three months before Washington's first inauguration eager office-seekers were already canvassing their chances of securing places of profit through the influence or votes of Senators. Thus, James Seagrove of Georgia wrote to General Webb, January 2, 1789:

As the new Government of the United States will soon take place, and of course all appointments be made, it behoves us all to look around and try what we can get. I am advised by all my friends this way to offer for the Collectorship of the Import for Georgia and have little doubt of being nominated by our Senators to Congress. But this alone will not do. It will be necessary to have as many friends as possible in the Senate.

Some weeks later he wrote:

There will be four Candidates for that office from Georgia so that it must be determined by a Vote of the Senate.<sup>1</sup>

The First Congress had been in session hardly three months when President Washington was affronted by the rejection of an excellent nomination, apparently for no other reason than that the nominee was not acceptable to the faction in Georgia politics which her

<sup>1</sup> *Webb Correspondence and Journals, 1772-1806* (edited by W. C. Ford), III, 121-24.

Senators chanced to represent — the first precedent of 'senatorial courtesy' in our history.<sup>1</sup>

In the first decades of government under the Constitution there were Senators who took Hamilton's view of their relation to the appointing power. Thus, George Cabot, Senator from Massachusetts in three Congresses (1791–96), early became convinced that

The power of the Senate was in no sense *initiative or even active*, but *negative and censorial*, and was never to be exercised but in cases where the *persons* proposed for office were *unfit*. I have always rejected the idea of non-concurrence with a nomination merely because the nominee was less suitable for the office than thousands of others: He must be positively *unfit* for the office, and the public duty not likely to be performed by him, to justify in my mind the non-concurrence. . . . A departure from this principle would soon wrest from the President altogether the essence of the nominating power, which is the power of selecting officers; and I am fully persuaded that the disposal of offices is of all things the most dangerous to a *body* of men. The motives to provide for the friends of each other, and to feed their dependents are so powerful, that they will always be yielded to by men who do not stand *individually* responsible to public opinion. I am persuaded that any body of men as numerous as the Senate, possessing such a power, however pure they may have been originally, will be corrupted by it, and will corrupt others.<sup>2</sup>

But to others the loaves and fishes looked too appetizing to be neglected, and concerted pressure among the Senators to control the nominations was developing even in Washington's time. John Adams declared that he found himself shackled. Unless his nominees met the approval of Hamilton and of department heads under his control, the Senate was almost sure to reject them. Even Jefferson, master of the arts of political leadership, was surprised to find, in the unexpected and embarrassing rejection of one of his nominations, evidence of a waning in the personal influence he had been wont to exert.<sup>3</sup> Madison was far more seriously hampered. The control over nominations was now dictated, not by non-members of the Senate, as in John Adams's day, but by a small group of associates in the Senate, operating chiefly when that body was in secret session. The President wished to nominate Gallatin as Secretary of State. But Robert Smith

<sup>1</sup> Page 54. 'Simply because the Georgia Senators preferred another,' was Benton's comment. *Abridgement of Debates*, 16–17, n.

<sup>2</sup> H. C. Lodge, *Life and Letters of George Cabot*, 240–41. Letter of Pickering, Sept. 23, 1799.

<sup>3</sup> Henry Adams, *Life of Gallatin*, 389–91, citing material in an unpublished paper by J. Q. Adams.

had a brother in the Senate. He and his friends wanted the post of Secretary of State for Robert Smith, and notified Madison that, if Gallatin's nomination were sent to the Senate, it would be rejected. To this pressure Madison was forced to yield. In discussing this matter, John Adams declared his belief that, if the eminently qualified Gallatin had been made Secretary of State, there would have been no war with Great Britain. But instead, 'a little cluster of Senators, by caballing in secret session, would place a sleepy Palinaurus at the helm even in the fury of the tempest.' Though this senatorial faction continued to harass Madison during the war, their prime movers soon had to retire from the Senate. But, said Adams, 'They left behind them practices in the Senate and a disposition in that body to usurp unconstitutional control, which have already effected much evil and threaten much more.'<sup>1</sup>

During a considerable portion of our history under the Constitution, the President has had to deal with a hostile majority in the Senate. For example, this was President Cleveland's plight during six of his eight years of service, and President Wilson's in the last two years in the White House. Not only have such changes in party control, affecting the Presidency and the Senate at different intervals, caused friction in the appointing function, but friction has also developed when a Vice-President's succession has brought a radical change in the type of man put forward for office. Tyler's and Johnson's nominees encountered far more opposition in the Senate than Harrison's or Lincoln's would have met.

With the increase in the number of offices to be filled, due to the rapid development of the country, to the growth of population, and also to such Acts as the four-years' law and that of 1837 creating hundreds of deputy postmasterships the country over, there developed the strong disposition on the part of the Senators to presume upon their intimate knowledge of local politics and upon the favor-granting among colleagues to make of the patronage a more personal perquisite. As early as 1820, Ninian Edwards, Senator from the newly admitted state of Illinois, was freely making to President Monroe recommendations as to the geographical distribution of nominations to office in that state, while to Crawford, the Secretary of the Treasury, he baldly suggested that all the nominations be left to the Senators to divide equally between their respective parties.<sup>2</sup> In a letter which

<sup>1</sup> Henry Adams, *Life of Gallatin*, 391.

<sup>2</sup> *Edwards Papers*, 168; 176; 181-85. Quoted by C. R. Fish, *op. cit.*, 100-01.

gave to his old friend Edwards the Administration's view as well as his own, Attorney-General William Wirt declared that the President 'thought it wrong that a President of the United States should permit himself to be influenced by considerations of local politics in a state, and that he should nominate with reference to the local effect on the respective Senators in their states. For my own part, I should consider it a species of bribery.' The course which Wirt thought that a President might and ought to take was 'to nominate no person whom either Senator declares unworthy to an office, if he can find a deserving man in the state free from such objection,' unless such objection should prove to be due to personal feeling or the animosity of local faction.<sup>1</sup>

Edwards's persistent pressure for control of the offices is typical of what was to be found in many parts of the country. There is abundant evidence that the revolution in the civil service which followed Jackson's accession to the Presidency found its occasion and opportunity rather than its cause in the coming into power of the chieftain, intent upon rewarding his friends and punishing his enemies. 'By the year 1828 . . . in every state throughout the North and West the spoils system either was established or there existed an element eager to introduce it.'<sup>2</sup> In the Senate itself, the proscription was anticipated and made easy. Thus, the committee, to which certain nominations had been referred, reported:

Because there are several propositions for a change in the judicial system now depending, and because the administration of the Government is about to change hands, it is inexpedient to advise and consent to the nomination now.<sup>3</sup>

The contrast in the first acts of the two Presidents is significant: John Quincy Adams at once renominated every one of Monroe's nominees, upon whose names the Senate had not acted. On the other hand, Jackson's first communication to the Senate was to announce:

The Executive nominations, made during the past session of Congress, and which remain unacted upon by the Senate, I hereby withdraw from its consideration.<sup>4</sup>

The decade beginning with Jackson's first Administration saw a great increase in the number of vacancies to be filled. New offices were created not only as required by growth of population and of

<sup>1</sup> *Edwards Papers*, 103.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 108, citing John Chambers to Senator Crittenden.

<sup>4</sup> Senate *Executive Journal*, IV, 6, March 6, 1829.

business, but as demanded by political considerations.<sup>1</sup> Senators were not slow to see that if they would but act together they could not only prevent encroachment upon the power and prestige of the Senate by the President through his control of the patronage, but, through their own power to prevent confirmation, they could wrest from the Executive concessions to the advantage of the Senate, of the party or faction in control of the Senate, and of the individual Senator in maintaining his grip upon his own constituency.

'The courtesy of the Senate' soon became a cherished usage. In its general application this fair phrase has come to signify deference, not to the President nor to the public interest, but to the wishes of one's colleagues — a courtesy of the Senate, for the Senate and by the Senate. In general practice this understanding or gentlemen's agreement has seemed to reduce to this: Nominations from a given state are not to be confirmed unless they have received the approval of the Senators of the President's party from that state, other Senators following their lead in the attitude they take toward such nominations.<sup>2</sup> The natural working of this give-and-take principle is to assure to the Senators, not only a dominant part in the distribution of offices within their several states, but a proportionate share of those in the general service at Washington and abroad.

One kindly, specialized form of senatorial courtesy is seen in the almost unbroken tradition that the nomination of a Senator or of a former member of the Senate will be confirmed at once, without even being referred to a committee. Thus, the nomination of Pierce Butler for a position upon the Supreme Bench was in controversy in the Senate for nearly a month, while that of ex-Senator Sutherland, without being referred to a committee, was confirmed by the Senate in open session within ten minutes after the name was received.<sup>3</sup>

Another minor manifestation of senatorial courtesy is found in the

<sup>1</sup> For example, the Act of 1837, creating deputy postmasterships, at one stroke added 400 to the number of offices to be filled by nominations which required the Senators' consent. The new policy of the President as to removals was also responsible for a great increase in the number of vacancies, and incited efforts to curb the Executive's power.

<sup>2</sup> Of course, if the Senators from the nominee's state are not of the President's party, he has a somewhat freer hand. Before submitting an important nomination to the Senate, a tactful President rarely fails to send to the individual Senator from the nominee's state a letter to this general effect: 'I intend to appoint — to the office of —, and I trust that the appointment will be satisfactory to you.'

<sup>3</sup> Butler, Nov. 23 to Dec. 21, 1922; Sutherland, Sept. 5, 1922. Nov., 1929, Senator Edge's nomination as Ambassador to France was at once confirmed, without having been referred to a committee.

A striking illustration of deference to the wishes of a colleague was shown at the end of the special session of the Senate, March 18, 1905, when 'Senatorial courtesy and

insistence that each of the Senate's members shall 'select the man who delivers to him his own mail.'<sup>1</sup> In other words, it is said that the Senate has never confirmed the nomination of a postmaster against the will of the Senator who lived where that post office was situated. Most Presidents pay careful heed to this preference.

The most selfish phase of senatorial courtesy is that which takes the form of a Senator's grounding his opposition solely on the fact that the nominee is 'personally obnoxious' to him. John Sharp Williams declared that when he once went before a subcommittee to urge the confirmation of a worthy nomination, he was 'solemnly informed that if a Senator rose in his place and said that someone was "personally obnoxious," there was no right to go behind his saying it.' In the long contest which after two years ended in the defeat of the nomination of George Rublee as member of the Federal Trade Commission, the opposition was led by Senator Gallinger. He made no attempt to show that the nominee was not qualified for the position, but appealed to the courtesy of the Senate solely on the ground that Rublee was 'personally obnoxious' to him.<sup>2</sup> More than one Senator

good feeling were called in play to hold up the Senate... for nearly an hour, while Senator Spooner held up the President for an appointment.' In the last list of nominations sent to the Senate, Spooner was disappointed at finding there was not included the renomination of a man of his own faction for U.S. District Attorney for the Eastern District of Wisconsin. After the final confirmations had been voted and the Senate was on the point of adjourning, Spooner asked, as a matter of courtesy to him, that the Senate remain in session until this attorneyship could be granted. The Senate was complacent. Going at once to the White House, Spooner learned that the nomination had been withheld because of objection from Senator-elect La Follette, his rival in Wisconsin politics. Spooner strenuously insisted that La Follette was not yet a Senator and that his objections, therefore, were not entitled to consideration. Returning to the Senate, he thanked his fellow Senators on both sides of the Chamber for their courtesy to him in remaining in session, and discoursed upon the intimate association of Senators and the absence of partisanship in maintaining the dignity and rights of that body. Hardly had he finished when the desired nomination was announced. It was quickly confirmed and the Senate at once adjourned. (*Boston Herald*, March 19, 1905.)

<sup>1</sup> Roger Foster, *Commentaries on the Constitution*, 492. Thus, Charles Sumner secured the appointment of the historian, Palfrey, as postmaster of Boston in preference to the three other candidates active in politics and backed by long lists of sponsors. President Cleveland, despite his ignoring of Hill in regard to other New York appointments, allowed him to name the postmaster at Albany in 1895, and Senator Hoar's influence kept a Republican in the Worcester post office during Cleveland's second Administration. A Massachusetts Congressman's attempt to assert his prescriptive privilege of naming the postmaster in his home city called from President Roosevelt a stinging rebuke, in which he declared: 'The Senators do not "select" postmasters in any state while I am President.' (Letter to A. P. Gardner, Oct. 28, 1904.) Upon entering the White House he had declared: 'The Senators and Congressmen shall ordinarily name the men, but I shall name the standard; and the men have got to come up to it.' (J. B. Bishop, *Theodore Roosevelt and His Time*, I, 157.)

<sup>2</sup> Page 776. May 23, 1916. See editorial in *New Republic*, May 20, 1916. In the debate over the nomination, La Follette assailed Gallinger's position, declaring that this was the first time since he had been in the Senate that the 'personally obnoxious' rule had been applied to a national appointment. *Cong. Rec.*, May 15, 1916.

of high standing has revolted at such a narrowly selfish appeal to senatorial courtesy. Said John Sharp Williams,

Before I would rise in a secret session of the Senate of the United States, to vent my private spleen or to voice my private enmity, or to express my sense of another man's personal enmity to me and defeat his nomination in that way without being able and willing to give some public reason for his defeat, I would resign my seat in that august body.<sup>1</sup>

What some Senators claim as their individual 'prerogative' under the phrase 'personally obnoxious' was most baldly set forth in the debate over a nomination for the post of collector of internal revenue in New Orleans. In opening the debate Long said:

I first state to the Senate that this nomination is offensive to me personally....

I have held, as has been the majority of the thought in this body, that no member of the Senate was called upon to justify his reasons for stating that a nominee was personally objectionable to him, but that when a state sent its ambassadors to the Senate, under the great doctrine of states' rights, no Senator would have to present anything except his own proposal that a nomination should not be confirmed by the Senate.

I am not one who is going to take the lead in destroying the prerogatives of the United States Senate.<sup>2</sup>

To his support came Wheeler, declaring that never, to his knowledge, had a Senator been required to specify his objections in the Senate. He cited the precedent of the rejection of a nomination for postmaster of Des Moines, Iowa.

All that Senator Brookhart did was to get up and say that the man who was nominated was personally objectionable to him, and the Democrats on this side and Republicans on the other stood up and turned the nomination down.<sup>3</sup>

He made no reference to the more recent precedent in which the same Senator figured. June 20, 1930, in open executive session the nomination of Hanford MacNider for Minister to Canada was taken up. Brookhart began thus:

In reference to this nomination, I filed an objection to it that it was personally objectionable to me in the highest degree. That objection still holds good.

<sup>1</sup> *Cong. Rec.*, 1454, May 14, 1921. Later in the debate Senator Williams said:

Above all the Senator ought to help me to get rid of what we call 'the courtesy of the Senate.'

Borah: I did not know we had any!

Oh yes, we have it — well, not real courtesy, but the courtesy of inimicality toward private people recommended for office without the previous sanction of a Senator who may be, and often is, the bitter personal enemy of the appointee for no better reason than that the appointee has never admired the Senator as a 'statesman.' (*Ibid.*, 1455.)

<sup>2</sup> *Cong. Rec.*, 5234, March 23, 1934.

<sup>3</sup> March 23, 1934, *Cong. Rec.*, 5244 ff.

He then proceeded to set forth the grounds of the nomination's obnoxiousness to him. His Democratic colleague from Iowa replied, pointing out the triviality and unfounded nature of the charges. One or two others spoke briefly. Then the vote was taken, and the nomination was declared confirmed. The press stated: 'Brookhart's "No" was the only dissent that was heard.'

Declaring that he knew nothing of the details of the New Orleans situation, Wheeler expounded the principle of 'senatorial courtesy' as follows:

I wish to state that if a Republican Senator were to state that the President had appointed someone from his state who was personally obnoxious to him, I should vote against his confirmation; and I am going to do the same thing with respect to Democratic Senators who protest and say that a certain nomination is personally obnoxious to them.

I should expect Senators to do the same with me, if I rose in the Senate and asked them to vote against a man who was personally obnoxious and offensive to me. I never have had occasion to do it, and I hope that I never shall have occasion to do it; but, if I were to do so, I should certainly expect the Members of this body to have the courage to vote against confirmation under those circumstances.

January 11, 1938, Senator Holt of West Virginia made 'personal obnoxiousness' to himself the ground of his passionate protest against the confirmation of F. Roy Yoke for collector of internal revenue. In 1917, Holt's father was a conscientious opponent of the United States' entering the World War, and at a Socialist convention had voiced his opinions in words that inflamed popular resentment the country over. In Holt's home town Yoke was then superintendent of schools. Speaking at a school assembly in which the twelve-year-old boy was among the pupils, he declared that 'Old Doc Holt ought to be lined up against a white wall and shot until his blood stained the wall!' In other ways he showed himself a leader in the brutally abusive attitude then prevalent in the community against the Holt family.

No Senator could fail to understand Holt's animosity toward Yoke, engendered by these war-time experiences. The committee's report, adverse to the nomination, was presented by Bailey, who expounded his own view of 'the unwritten law of the Senate known as 'the personal obnoxiousness rule.'

It is a rule that rises above the courtesies we owe to every Senator. . . . When it is invoked by a Senator, the whole question in my mind is, is his action arbitrary, is it political? If so, I would have a right to reject it.

But if it is well founded, then my respect for the Senate rule, a sense of my own self-protection under similar conditions, commands me to sustain the rule.<sup>1</sup> . . . I rather think that the rule should not go. It has been a rule of the Senate a long time.

Despite Holt's protest, and this defense of the 'rule' by Bailey in presenting the Finance Committee's adverse recommendation, the nomination of Yoke was confirmed by a vote of 46 to 15.

The next day Senator Borah submitted a significant resolution. Declaring that it had been the practice (not the 'rule') of the Senate to refuse to confirm a nomination stated to be personally objectionable by a Senator from the state affected, and that the matter of confirmation should be determined by the qualifications and fitness of the nominee, and not by the personal feelings, likes or dislikes of a Senator, it proceeded:

Whereas such a practice transfers the power of rejection or confirmation from the Senate as a whole to a single Senator, in violation of the spirit, if not of the letter, of the Constitution;

Therefore, be it

Resolved: That the Senate discontinues and disapproves of such practice and will hereafter not respect or give effect to objections based upon the fact that said nominee may be declared personally offensive or personally objectionable to a Senator.<sup>2</sup>

The courtesy of the Senate has been involved in some of the contests which Presidents have found the most embarrassing and menacing of their administrations. A Massachusetts Senator's refusal to invoke the courtesy of the Senate against an unworthy nomination may have cost President Grant a nomination for the third term in the White House. Under the malign influence of Representative Benjamin F. Butler, Grant nominated W. A. Simmons as Collector of the Port of Boston, the principal federal officer of Massachusetts. The nomination brought forth a storm of protest from the leading business men of Boston. Senator Sumner's opposition to the nomination seemed to clinch Grant's determination to insist upon it.<sup>3</sup> Senator Boutwell of Massachusetts, Chairman of the Committee on Com-

<sup>1</sup> Early in his own career in the Senate, Bailey had successfully invoked this 'personal obnoxiousness rule' against a North Carolina nominee.

<sup>2</sup> S. Res. 221. It was referred to the Committee on Rules.

<sup>3</sup> George F. Hoar, then a Massachusetts Congressman, urged the President to withdraw the nomination. At the moment the two were walking along the east side of Lafayette Square. To Hoar's astonishment, the President, with great passion, shaking his clenched fist at Sumner's house, said: 'I shall not withdraw the nomination. That man who lives up there has abused me in a way that I never endured from any other man living.' *Autobiography*, I, 210-12.

merce to which the nomination was referred, secured a vote in the committee adverse to the nomination. Butler's threat to defeat his re-election did not shake his purpose.

In the Senate I opposed confirmation on the ground that a majority of the Republican Party were dissatisfied, that it was an unnecessary act of violence to their feelings, that there were other men who were acceptable who could be considered, and that the means by which the nomination had been secured could not be defended. I was then challenged to say whether I appealed to the courtesy of the Senate. I said: 'No, I do not; I ask for the rejection of Simmons on the ground that the nomination ought not to have been made.' Sumner appealed to the courtesy of the Senate, but he had then wandered so far from the Republican Party that his appeal was disregarded.<sup>1</sup>

The nomination was confirmed. But Senator Hoar was of the opinion that but for this appointment, which showed Grant's subjection to Butler's influence, Massachusetts' support would have made Grant's third nomination for the Presidency certain.<sup>2</sup>

The contest of most momentous consequences, in which the courtesy of the Senate was the chief issue, was that between President Garfield and the New York Senators in 1881. At the Chicago convention Senator Conkling had placed President Grant in nomination for re-election, but Garfield's nomination was brought about, in part by the aid of some of the New York delegation led by Judge Robertson, who had broken away from Conkling's leadership. At first the 'stalwarts' sulked, but later agreed to support the nominee. Platt has alleged that at conferences during the campaign Garfield assured the 'stalwarts' that they should be given a position in the Cabinet, and that important positions in New York would not be filled without consulting the organization leaders. President Garfield later declared that at an interview which he had hoped would lead to harmony, Conkling would not listen to a distribution of appointments, without regard to the factional division of the party in New York, between the Grant and Garfield adherents, but insisted that in all cases the Senators should be consulted. Conkling said that if the President chose to send Robertson abroad he would make no objection, but that he would not consent to that man's appointment to any important office in this country. The Senator's behavior in this interview was so insolent that it was difficult for the President to control himself and keep from ordering the man out of his presence. Such

<sup>1</sup> G. S. Boutwell, *Sixty Years in Public Affairs*, II, 282-83.

<sup>2</sup> G. F. Hoar, *op. cit.*, I, 212; II, 1, 3.

was the version given by Garfield to Senator Hoar, who commented:

Nothing could be more preposterous or insolent than the demand of a Senator from any state that a President, just elected, who had received the support of the people of that state, should ostracize his own supporters. It would have been infamous for Garfield to yield to the demand.<sup>1</sup>

When the first list of nominations from New York was submitted to the Senate, the 'stalwarts' were dissatisfied with the recognition accorded to them, although by others they were much criticized as a surrender to Conkling. Without delay and without warning, the President sent in the nomination of Robertson for the Collector of the Port of New York.<sup>2</sup> Conkling was inclined to fight the nomination in the committee to which it was referred, but his colleague, Platt, said to him: 'We have been so humiliated as United States Senators from the great State of New York, that there is but one thing for us to do — rebuke the President by immediately turning in our resignations . . . and then appeal to the Legislature to sustain us.'<sup>3</sup> Blaine prophesied, 'Conkling will not saw off the limb of a tree, when he is on the other end.'<sup>4</sup> But that is just what he and Platt proceeded to do. The Vice-President, the Postmaster-General, the Governor of New York, and sixty out of the eighty-one Republicans in the New York Assembly, protested against the Robertson nomination. A caucus of Republican Senators, with unanimity, declared its unqualified disapproval of the President's course, 'and deputized a committee who waited upon the President, presenting a remonstrance and a warning of the disasters certain to fall upon the Republican Party in New York,' unless the Robertson nomination were withdrawn. To them the President defiantly replied:

I do not propose to be dictated to. Any Republican Senator who votes against my nominations may know that he can expect no favors from the

<sup>1</sup> G. F. Hoar, *op. cit.*, II, 56-57.

<sup>2</sup> There was much criticism of this action. 'Conkling could not fail to regard the nomination of Judge Robertson as a wilful and premeditated violation of the pledge given at the Sunday conference. It was, however, only one instance of General Garfield's impulsive and unreasoning submission to an expression of public opinion. That weakness had been observed by his associates in the House of Representatives, and on that weakness his administration was wrecked.' (G. S. Boutwell, *op. cit.*, II, 273-74.) He thought President Arthur should have removed Robertson promptly. To make a place for Robertson, Garfield had peremptorily removed General Merritt, the 'stalwart' incumbent, at once.

<sup>3</sup> T. C. Platt, *Autobiography*, 151.

<sup>4</sup> J. F. Rhodes (*History*, VIII, 145) quotes this on authority of Gail Hamilton, and presents other views of the contest.

Executive. Senators who dare oppose the Executive will henceforth require letters of introduction to the White House.<sup>1</sup>

That defiance left no room for compromise. May 14 the two Senators sent their resignations to the Governor, declaring that they were forced to choose between 'plain and sworn duty and disloyalty to the Administration which they had helped to bring in,' and adding, in reference to the ousting of the official whom Robertson was to succeed,

It can hardly be maintained that the Senate are bound to remove, without cause, incumbents merely to make place for those whom any individual, even the President or a member of the Cabinet, wishes to repay for being recreant to others and serviceable to him.<sup>2</sup>

Four days after the Senators' resignation, without a record vote, the Senate confirmed the nomination of Robertson.<sup>3</sup> The scene then shifted to Albany. For two months the weary struggle continued. But despite all the pressure which Platt and Conkling, aided by the personal influence and activity of the Vice-President,<sup>4</sup> could bring to bear, the New York Assembly chose new men to fill the vacancies in the Senate.

The most notable contest in which a successful appeal was made to the courtesy of the Senate was in the filling of a vacancy in the Supreme Court. In December, 1893, without consulting Senator Hill, who represented the Tammany wing of New York Democrats,

<sup>1</sup> T. C. Platt, *Autobiography*, 152.

<sup>2</sup> *New York Nation*, May 19, 1881. 'This action on the part of Conkling must be regarded as an attempt to enforce the doctrine that not only could the Senate control appointments, but that the Senate could severally control those from their respective States — a doctrine which may be considered as the high-water mark of the Senate's claims.... The Senate itself rejected the doctrine put forward by unanimously confirming Robertson.' C. R. Fish, *op. cit.*, 205, citing *New York Nation*, comment of June 23 and July 28, 1881.

<sup>3</sup> May 18, 1881, Senate *Executive Journal*, XXIII, 87.

<sup>4</sup> 'Arthur, with the prestige of the Vice-Presidency, left his chair in the Senate to work for the re-election and triumphant return of Conkling and Platt, on the doctrine that the appointments of a President must be personally acceptable to the Senators from the State concerned.' (F. L. Paxson, *The New Nation*, 103.) Arthur entered actively into the contest at Albany, but the special session of the Senate ended May 20 — and it is clear that he never 'left his chair in the Senate' for that purpose. While the spiritless balloting was still going on at Albany, July 2, Garfield was shot. Asked why he shot the President, the assassin replied, 'I am a "Stalwart," and I want Arthur for President.' This aroused intense feeling against Platt and Conkling and doubtless contributed in some degree to their defeat. T. C. Platt, *Autobiography*, 162–65.

This controversy is dealt with at length in T. C. Smith's *Life of James Abram Garfield*, with many citations. It is said that after the death of Garfield, Conkling came to Arthur demanding that he be made Secretary of the Treasury, that with his own hand he might notify Robertson of his dismissal. 'He discovered, however, that Mr. Arthur had become President.' His demand was refused.

President Cleveland sent to the Senate the nomination of W. B. Hornblower, an eminent jurist in his own state. After the nomination had been for over a month in the hands of the Committee on the Judiciary, of which Hill was a member but not chairman, Hill reported it adversely, and a week later it was rejected by the Senate. Despite this clear indication of the opposition which an appeal to senatorial courtesy might be expected to evoke even in a Senate containing a large majority of his own party, the President, again ignoring Hill, forthwith sent in the nomination of another New York Democrat for the same position. After three weeks' consideration the Chairman of the Committee on the Judiciary reported this nomination back 'without recommendation, the Committee being equally divided.' It was rejected by the Senate by even stronger opposition.<sup>1</sup> The next day after this second rebuff, the President countered on the Senate by nominating for the vacant justiceship Edward Douglas White, then a Senator from Louisiana. Senatorial courtesy of another sort now came to the President's support. By unanimous consent, without referring it to a committee, the Senate proceeded immediately to the consideration and confirmation of the

<sup>1</sup> Hornblower rejection, 24 to 30, Jan. 15, 1894. Peckham rejection, 32 to 41, Feb. 18, 1894. Senator Hoar, who voted for Hornblower, but against Peckham, justified his discrimination on the ground that he became convinced that Peckham was 'a man of strong prejudices, with little of the judicial temper and quality about him.' In his opinion 'Mr. Cleveland ought not to have made such an appointment without consulting Mr. Hill, who was a lawyer of eminence and knew the sentiment of the majority of the Democratic Party. Mr. Cleveland had nominated in succession two persons, to an office which ought to be absolutely non-partisan, who belonged to a very small company of men devoted to his personal fortunes, who had bitterly attacked Mr. Hill.' *Autobiography*, II, 172-73.

That Platt's lust to control offices for himself and for his henchmen continued unabated is attested by a document published two days after his death, March 6, 1910. William E. Curtis, Washington correspondent for the *Chicago Record-Herald*, stated that Platt, years before, had handed it to him in a sealed envelope, not to be opened till after both Harrison and Platt were dead.

The document, written in the third person, asserted that during the protracted deadlock in the Republican National Convention of 1888, at a conference in Platt's hotel room Senator Elkins announced that he was authorized to say that if the New York delegation would give their support to General Harrison, in case of his election he would appoint Platt Secretary of the Treasury and allow him to control federal patronage in the State of New York. In consequence of this announcement, the New York delegation threw its solid support to Harrison, who was soon nominated. A few days before the election, Quay, Chairman of the Republican Campaign Committee, came to Platt, saying that its treasury was empty, and that unless \$150,000 were immediately raised, the headquarters would have to be closed. Platt went out and borrowed the \$150,000 on his personal note. Quay frequently asserted that that money elected President Harrison. 'Several weeks after the election the President-elect said he could not offer Mr. Platt a seat in his Cabinet, and when pressed for his reasons, declined to give them.' An interesting anecdote — but one which was not allowed to get into print till both principals to the alleged bargain were dead!

nomination, taking the further step of ordering that the injunction of secrecy be removed from the proceedings of the Senate upon *this* nomination.

In nominating Senator Black for the position upon the Supreme Court in succession to Associate-Justice Van Devanter in August, 1937, President Roosevelt rightly forecast that 'senatorial courtesy' could not fail to gain immediate confirmation for that surprising nomination. But the sequel was humiliating.<sup>1</sup> When another vacancy was about to be filled, before a nomination had been submitted the Chairman of the Committee on the Judiciary, who had urged immediate confirmation of Black, as a colleague known to all his fellow Senators, announced that in future all nominations for the Supreme Court would be referred for hearings and report. Accordingly, the nomination of Solicitor-General Stanley F. Reed was referred, a hearing was held by a subcommittee of the Committee on the Judiciary, its report received the unanimous approval of the committee, and the Senate gave it immediate confirmation.

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#### THE SENATE AND THE MOVEMENT FOR REFORM OF THE CIVIL SERVICE

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The enormous increase in the number of officers in civil service in the middle of the past century had already made the power of appointment and removal a burdensome responsibility in the exercise of which the President was forced, by his ignorance of the qualifications, technical, moral, or political, of the thousands of applicants, to place large dependence upon the recommendations of Senators and Representatives. The pressure of war problems necessitated some measure of relief, and President Lincoln had not been in office a fortnight when official announcement was made that the appointment of postmasters with annual salaries of less than one thousand dollars would be made upon the recommendation of members of Congress in the different districts, and that applications addressed to them would receive attention earlier than those sent directly to the Post

<sup>1</sup> Page 1100.

Office Department. Professor Salmon characterized this announcement as 'a last and fatal surrender of one of the chief executive functions . . . to an ally that has often since played the part of traitor.'<sup>1</sup> From this time on, many members of both branches of Congress came to look upon the purveying of offices to their constituents as one of their regular perquisites.

Yet Senator Sumner saw that there was a better way at one and the same time for relieving the burden upon the President and for securing more efficient service. In 1864, by unanimous consent, he introduced a bill to provide a competitive system of examinations in the civil service of the United States.<sup>2</sup> He asked that it lie upon the table and be printed, as there was no committee of the Senate that might properly take it under consideration. Sumner's bill was never reported from committee. Nevertheless, the merit of its proposal soon began to secure recognition.

The first Act of Congress intended to provide for reform of the civil service had a peculiar origin. In the closing hours of the session, March 3, 1871, Senator Trumbull introduced an amendment to the pending Civil Appropriation Bill, authorizing the President to

prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof and ascertain the fitness of each candidate in respect to age, health, character, knowledge and ability for the branch of the service into which he asks to enter.<sup>3</sup>

He explained that the measure was thus brought in as a 'rider' from the Committee on the Judiciary as being the only method by which, in the expiring hours of the session, it could be brought to the attention of the other House, where, it was understood, it would be accepted. He said of the measure: 'It goes a very little way; but it is a

<sup>1</sup> *History of the Appointing Power of the President*, citing Washington correspondence of the *New York Tribune*, March 16, 1861.

<sup>2</sup> April 30, 1864, *Cong. Globe*, 1885; Sumner, *Works*, VIII, 452-57. His bill, 'to provide for the greater efficiency of the civil service,' provided for 'a board of examiners, appointed by competitive examination, promotion by seniority, and removal for good cause only; it received some favorable comment from the press.' (C. R. Fish, *op. cit.*, 210.)

<sup>3</sup> The following year, T. A. Jenckes, a Representative from Rhode Island, introduced in the House his first comprehensive bill for the reform of the civil service. After a year's delay it was tabled, Feb. 6, 1867. What else was to be expected from a Congress which was in the mood to pass over the President's veto the Tenure of Office Act? (March 2, 1867.) The effect of this law, as successive Presidents bitterly complained, instead of raising the standards in the civil service, was to shackle the President in any efforts he might make to better its quality by removing ineffective office-holders. (L. M. Salmon, *op. cit.*, 91-92.) *Cong. Globe*, 1897, March 3, 1871.

beginning in the right direction.' Despite opposition, the Senate agreed to the amendment without debate by a vote of 32 to 24. In the House the amendments were presented so late in the day that it was announced that the impossibility of getting the bill engrossed would prevent its passage, unless it could reach the engrossing clerks by five o'clock. President Grant's hearty advocacy of the principle of this measure in his last message was quoted. But Logan denounced this civil service reform provision as in his opinion 'the most obnoxious bill of the character which has ever come before this House,' and protested against putting such a rider upon an appropriation bill at that hour, when the House 'has uniformly voted down every bill of this kind that has come before it.' Without a roll-call, the amended bill was passed by a vote of 90 to 20.<sup>1</sup>

President Grant's enthusiasm for civil service reform, apparently at first earnest and sincere, after four years of disillusionizing experience was so chilled by congressional indifference and hostility that the failure of Congress, after due warning,<sup>2</sup> to make appropriation for the work of the commission led to his order for the abandonment of civil service regulations (March 9, 1875). Nevertheless, the conviction was growing, both among executive officers and Senators, that the blurring of responsibility and the substitution of influence for tests of fitness were proving a humiliating burden upon those who had a part in appointments, and were producing scandalous inefficiency in the service. In 1877, Garfield declared: 'One third of the working hours of Senators and Representatives is hardly sufficient to meet the demands in reference to appointments for office.'<sup>3</sup>

The tremendous struggle between President Garfield and the Senators from New York and his death at the hand of a disappointed office-seeker aroused the country to the degradation which the spoils system had wrought. Despite the fact that President Hayes had removed Chester A. Arthur from the office of Collector of the Port of New York for spoilsman's activities, in his first annual message President Arthur laid strong emphasis upon the necessity for civil

<sup>1</sup> *Cong. Globe*, 1934-36, March 3, 1871.

<sup>2</sup> In his message to Congress, Dec. 7, 1874, he said: 'The rules have been adhered to as closely as has been practicable with the opposition with which they met.... But it is impracticable to maintain them without direct and positive support of Congress.... Under these circumstances, therefore, I announce that if Congress adjourns without positive legislation on the subject of civil service reform, I will regard such action as a disapproval of the system, and will abandon it, except so far as to require examinations for certain appointees, to determine their fitness.'

<sup>3</sup> D. B. Eaton, *op. cit.*, 20-21.

service reform.<sup>1</sup> When Senator Pendleton's bill, 'to regulate and improve the civil service of the United States,' was introduced in the next session, it found members in both the Senate and the House ready to recognize a popular demand for 'reform,' however lacking in faith they may have been in the proposal, and it was promptly enacted into law.<sup>2</sup> Senator Brown of Georgia immediately moved to substitute for the bill's title the following: 'A bill to perpetuate in office the Republicans who now control the patronage of the Government.'<sup>3</sup>

From the small beginnings made possible by the Pendleton Act, the movement has made progress, which, though at times halting and unsteady, has brought within the classified service an ever-increasing proportion of those holding public office. Senator Hoar's judgment was that, while the claim of Senators, through Senatorial courtesy, to dictate appointments was untenable and of injurious public consequences, it tended to maintain and increase the authority of the Senate. He was of the opinion that 'the reform of the civil service has doubtless shorn the office of Senator of a good deal of its power.'<sup>4</sup> Yet, while civil service rules now regulate the appointment and tenure of a great majority of the holders of office, it is clear that few nominations to positions of the highest influence and pay are made without the President's making careful appraisal of senatorial opinion in advance, and in this range of positions senatorial courtesy is as potent as ever.<sup>5</sup>

<sup>1</sup> *Messages*, VIII, 60–62; T. C. Smith, *Garfield*, 962.

<sup>2</sup> Senator Pendleton declared experience had shown 'the intrigue, solicitation and coercion of these officers without stable tenure to be the prolific parent of fraud, corruption and brutality.... It drives Senators and Representatives into neglect of their chief duty of legislation... and too often makes the support of an administration conditioned upon their obtaining offices for their friends.' Senator Dawes: 'It [the spoils system] destroys his [the Senator's] independence and makes him a slave.' Senator Hawley: 'We shall relieve the members of the legislative branch of the Government from three-quarters of their annoyances.'

<sup>3</sup> The debate is well summarized by Fish, *op. cit.*, 218–21. The scoffing opposition was long-continued, but the votes were decisive: In the Senate (Dec. 20, 1882), 38 to 5 — 33 being absent; in the House (Jan. 4, 1883), 155 to 47 — 87 not voting.

<sup>4</sup> *Autobiography*, II, 46.

<sup>5</sup> In 1924 and 1925, the press mentioned many conferences by President Coolidge with Senators before naming men to fill vacancies in the positions of Secretary of the Navy and Attorney-General. Senatorial recommendations of applicants are subject to the following restriction: 'That no recommendation of any person who shall apply for office or place under the provisions of the act which may be given by any Senator or member of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.' (22 Stat., 403, sec. 10.) Senators are also forbidden, directly or indirectly, 'to solicit or receive, or be in any manner concerned in soliciting or receiving' any assessment or contribution for a political purpose from any U.S. employee.

## THE SENATE'S REJECTION OF NOMINATIONS

'It has been said that a President is known by the appointments he makes.' May a Senate be known by the appointments it prevents? Of course the Senate's judgment is not that of one man, but of a large body of men, its personnel always made up of different party groups, undergoing frequent changes in relative numbers, in political views, and in their attitude toward the President of the day. How considerable a check has the Senate's 'negative on appointments' proved to be? In what spirit has it been exercised? These questions are not to be answered by any mere enumeration of rejected nominations, if such data were available. For in a sense the Senate's negative on appointments, like the President's veto on legislation, has often been most effective where not actually used: the consciousness of an imminent rejection or veto acts as an ever-present restraint. Thus, Jefferson did not nominate Gallatin as Secretary of the Treasury for fear of the Senate's rejection, and Madison reluctantly relinquished his plan to name Gallatin as Secretary of State, when assured that a Senate cabal would defeat confirmation.

While the appointing power was being exercised by 'Statesmen' Presidents — to use Professor Salmon's phrase — actual rejections were few.<sup>1</sup>

### NOMINATIONS TO THE SUPREME COURT

In regard to just one clearly defined group of major offices, the record of the Senate's use of its 'negative' is complete. In his admirable treatise, *The Supreme Court in United States History*, Mr. Charles Warren includes a list of all the nominations ever submitted to the Senate for positions upon the Supreme Bench.<sup>2</sup> From 1789 to

<sup>1</sup> In Miss Clara H. Kerr's *Origin and Development of the United States Senate*, 110 to 111, the following statistics are given: Washington (1789–97), 5 rejections; Adams (1797–1801), 8 nominees rejected and 9 'postponed'; Jefferson (1801–09), 3 rejected during the 'first six years'; Madison (1809–17), 19 rejected during the first term.

<sup>2</sup> III, Appendix. This list of 109 includes seven duplications, where the same name, rejected or withdrawn, was later resubmitted, or where an Associate Justice has been named as Chief Justice. The Warren list of 100 is here extended to the year 1938.

February 1, 1938, the list includes one hundred and nine nominations. In dealing with these there have been but eight actual rejections; but to this number should be added six nominations that the Senate by definite vote postponed, five that it did not act upon, and two that were withdrawn, the President having become convinced that their confirmation could not be secured. Thus, the Senate's 'negative,' whether actually exercised or not, has defeated the President's purpose in twenty-one nominations out of one hundred and nine — about one in five. Mr. Warren's judicial analysis seems to indicate that in the main the Senate's use of its negative has been creditable, and that in at least four instances the Senate showed better discrimination than did the President who made the nomination.<sup>1</sup>

Only four Presidents have encountered the rejection of more than one nomination to the Supreme Court.<sup>2</sup> In six instances, where the nomination was postponed or not acted upon, this course was due to the Senate's natural reluctance to confirm for a life appointment a nomination made by a President in the months following a national election which showed that he and his party no longer had the confidence of the country.<sup>3</sup> Partisan opposition doubtless played some part in preventing the appointment of quite a number of nominees, but that consideration alone has excluded not more than one or two men of eminent qualifications.<sup>4</sup> An appeal to senatorial courtesy

<sup>1</sup> Rutledge, Wolcott, Williams, and Cushing. In two of these instances, decisive information came to light after the nomination had been made, but before the Senate acted. The case of Rutledge was highly exceptional. After having served from 1789 to 1791 as Associate Justice of the Supreme Court, he resigned to become Chief Justice of the Supreme Court of South Carolina. But when Chief Justice Jay resigned, Rutledge pressed his qualifications upon Washington. Accordingly, during recess of the Senate, the President appointed him Chief Justice. He took the oath, and actually served during one term of the Court. Before his nomination was brought up in the Senate, well-grounded opposition had been aroused because of reports of the violently partisan speech which he had made upon receiving news of the signing of Jay's Treaty, and because of intermittent attacks of mental derangement.

Cushing's legal qualifications were of a high order, but he was a man of seventy-four, and his erratic course in politics had made him distrusted. The disclosure of a friendly letter of recommendation, addressed by him March 20, 1861, to Jefferson Davis as President of the Confederacy, made confirmation impossible. The letter, as printed in the *Chronicle*, Cushing's recent biographer with justice characterizes as 'an impudent and shameless forgery.' It changed the form of address from 'Dear Sir' to 'My dear Friend,' and commended the bearer as one who 'has had seven years' experience in the Ordnance Department . . . and has been an efficient officer. . . . I think you will find him of special service to you.' As a matter of fact, the man had been a clerk in the Attorney-General's office and knew nothing of ordnance or warfare. But the false imputations gained their object. C. M. Fuess, *Life of Caleb Cushing*, II, 370-73.

<sup>2</sup> Tyler, 5; Fillmore, 3; Grant, 3; Cleveland, 2.

<sup>3</sup> Crittenden, Dec. 1828; Read, Feb., 1845; Badger, Jan., 1853; Micou, Feb., 1853; Black, Feb., 1861; Matthews, Jan., 1881.

<sup>4</sup> Both Taney and Matthews, when renominated, were confirmed.

prevented the appointment of Hornblower and Peckham; on the other hand, while the courtesy of the Senate secured immediate confirmation of White and Sutherland, it did not avail in the cases of Crittenden, Badger, and Williams. In one instance it is probable that rejection was due to personal resentment. E. Rockwood Hoar, Grant's Attorney-General, was a man of highest character and legal attainments, but he was brusque of manner and had affronted many Senators by his insistence that the newly created circuit courts of the United States should be manned by the best lawyers, without senatorial dictation. Upon his rejection, Senator Cameron voiced his colleagues' views: 'What could you expect for a man who had snubbed seventy Senators!'<sup>1</sup>

In 1930, within a period of four months there were submitted to the Senate three nominations for positions upon the Supreme Court. The handling of these nominations was symptomatic of the Senate's new attitude as to the qualifications to be required in appointees to high judicial positions.<sup>2</sup> A week from the day of Chief Justice Taft's resignation the nomination of Charles Evans Hughes was reported favorably to the Senate from the Judiciary Committee by its chairman, Senator Norris.<sup>3</sup> He, however, declared his personal opposition

<sup>1</sup> Seventy was then the entire membership of the Senate. Moorfield Storey and Edward Emerson, *Ebenezer Rockwood Hoar*, 197.

<sup>2</sup> In fact, a precedent for such senatorial inquisition had been set five years earlier. Attorney-General Harlan F. Stone had been the target for criticism for his handling of a case in which a Senator was involved (p. 781, n. 4). Accordingly, although Stone's nomination to the Supreme Court had been favorably reported from the Judiciary Committee, it was recommitted for further consideration. Contrary to all precedent, it was voted that this nomination to the Supreme Court be considered by the Senate in 'open executive session' (Feb. 4, 1925). How unsubstantial was the real opposition is shown by the fact that the next day, after debate in which one Senator's ranting occupied most of the time, the nomination was confirmed by a vote of 71 to 6.

Although the Stone nomination for the Supreme Court was the first which was considered in open executive session, great publicity was ultimately given to the records of the committee report and to the vote, but not to the Senate debate, on the Brandeis nomination. Submitted to the Senate Jan. 28, 1916, it encountered strong opposition, and was held in the Committee on the Judiciary so long that the charge was made in the press that it was being purposely delayed until after the nominating conventions. May 25, however, a complicated unanimous-consent agreement was reached which removed the barrier to action. It provided that majority and minority reports from the Judiciary Committee might be filed not later than June 1, and printed in confidence for the use of the Senators; that at 5 P.M., June 1, the Senate should proceed to vote, without debate, upon the nomination to a final conclusion; that, after that vote, the said reports, the proceedings upon the vote should be printed in the *Record*, and the injunction of secrecy removed from all matters in relation to said nomination. The vote on the nomination resulted: Yeas, 47; nays, 22; not voting, 27. For the report of the committee hearings see *Cong. Rec.*, 9032-84, June 1, 1916.

<sup>3</sup> Its consideration was delayed for a day by the objection of a Senator who insisted upon seeing a physician's certificate that the Taft illness was serious; he professed to believe that 'somebody has fooled that poor old gentleman' into resigning!

to the nomination on two grounds: first, his belief that it would prove an unfortunate precedent for a man to return to a place upon the Supreme Court who had resigned therefrom in order to become a candidate for the Presidency,<sup>1</sup> and who, in the interim since defeat in his political campaign, had 'capitalized his prestige in amassing a fortune,' largely by practice before the Supreme Court; second, in an age of rapidly increasing advances of monopoly, 'no one in public life so exemplifies the influence of powerful combinations in the political and financial world as does he.'<sup>2</sup>

For three days the nomination was considered in the Senate in open executive session. By his most relentless opponents — and they ranged from staunch Democratic conservatives to Republican 'insurgents' — the nominee was 'hailed as one of the greatest lawyers the country has ever produced.' His personal character was held to be above reproach, his pre-eminence at the bar and upon the bench was universally recognized; yet his suitability as head of the highest court in the land was fiercely attacked. The attitude of his opponents was stated thus:

Since the United States Supreme Court has departed from anything related to a fixed body of law except by the most tenuous thread, and has become a body engaged in the practice of economics, it becomes highly relevant to know just what kind of economic theories the members of that Court hold.<sup>3</sup>

Probably few of his critics in the Senate had any expectation of defeating his appointment, but they were resolved to focus the attention of the public upon the essential conservatism of the existing Supreme Court. Another line of protest came from a Southern Senator who asserted that in his previous service in the Supreme Court Justice Hughes had participated in the Shreveport decision, 'which practically extirpated every remaining right that any state

<sup>1</sup> In May, 1916, when the candidacy of Hughes was being advocated, Viscount Bryce wrote to Mr. Charles G. Washburn: 'It would never do for anyone to leave the Supreme Court to be a candidate unless he were certain to be elected.' G. H. Haynes, *Life of Charles G. Washburn*, 134.

<sup>2</sup> He declared that in the 54 cases in which Mr. Hughes had appeared before the Supreme Court since his resignation in 1916, 'almost invariably he has represented corporations of almost untold wealth.' *Cong. Rec.*, 3372, Feb. 10, 1930.

<sup>3</sup> Editorial in *Baltimore Sun*, Feb. 13, 1930 — the day of the final vote, inserted in *Cong. Rec.*, 3553. The writer called attention to the earlier attitude of the Supreme Court in keeping its hands off questions as to public utilities, and its later reversal of that attitude, and its assumption of the determination of intricate economic problems of valuation and rate-fixing.

had over intrastate commerce.<sup>1</sup> The contest aroused tense public interest. The galleries were thronged. Believing that they were gaining strength, the leaders of the opposition tried in vain to delay the decision. The nomination was approved by a two-to-one vote.<sup>2</sup>

In less than a month another vacancy occurred in the Supreme Court, caused by the death of Justice Sanford. From those who had been opposing the nomination of Chief Justice Hughes came the demand that this position must be given to a 'liberal.' At the President's request, the Attorney-General made a thorough inquiry as to the qualifications of a considerable number of judges from the four circuits then not represented upon the Supreme Bench, and on his recommendation the President nominated a young judge from the Circuit Court of Appeals of the Fourth Circuit, which had not been represented in the Supreme Court for sixty years — Judge John J. Parker of North Carolina. The nomination was held for weeks in the Committee on the Judiciary. It was evident that strong opposition was developing. Democrats and 'coalitionists' who had made common cause against the Hughes nomination seized this new opportunity with eagerness. In the first place, it was charged that the nomination was political — the most conspicuous recognition that had been given by President Hoover to a Republican from a Southern State which had supported him in 1928.<sup>3</sup> Strong pressure against Parker was brought to bear upon the Senate from two outside organizations. The President of the American Federation of Labor took the lead in this protest because of an injunction which Judge Parker had granted, restraining the United Mine Workers of America from soliciting membership among the employees of the Red Jacket Consolidated Coal and Coke Company. The labor leaders had declared a strike in an attempt to unionize the field, and were endeavor-

<sup>1</sup> Carter Glass, *Cong. Rec.*, 3553.

<sup>2</sup> For, 52 — 38 Republicans, 14 Democrats; against, 26 — 11 Republicans, 15 Democrats.

In ex-Senator Pepper's opinion: 'Senatorial meddling with judicial nominations is an unmixed evil.... The debate on the nomination of Chief Justice Hughes seemed to me to disclose the Senate at its worst.... Confirmation was inevitable. Nothing was said which justified resistance on any generally accepted test. The net result was that the Chief Justice waxed and the Senate waned.' *Family Quarrels*, 89.

In Professor Felix Frankfurter's opinion, on the other hand, the Senate is performing a fundamental duty when it weighs carefully the opinions and the social outlook of presidential appointees to our highest tribunal. 'The ultimate determinant is the quality of the Justices — the general direction of mind of the prospective members of the Court toward public issues.' *Forum* (June, 1930), 329-34.

<sup>3</sup> The nomination was a natural one in succession to Justice Sanford, a Republican from a border state, Tennessee.

ing by every means to procure the company's workmen to break their contracts by which they had agreed not to join the union while remaining in the company's service.<sup>1</sup> From the Association for the Advancement of Colored People came urgent opposition based upon the charge that in a political campaign Parker had made a speech revealing prejudice against the Negroes.

Contrary to precedent, although Parker requested a hearing before the committee investigating his nomination, he was given no opportunity to appear. President Hoover issued a memorandum, prepared by the Department of Justice in support of the nomination, pointing out Parker's high qualifications and eminent sponsors, and setting forth that in the one decision which was being so harshly condemned he had nowhere pressed or indicated any personal views about any questions involved, as he had no freedom of judgment upon any of them, inasmuch as he was bound by decisions of the United States Supreme Court.<sup>2</sup> Furthermore, when the United Mine Workers filed a petition for a writ of certiorari asking that the United States Supreme Court review Judge Parker's decision, the petition for certiorari was denied.

Despite this strong support from the Administration, the Judiciary Committee reported against the nomination.<sup>3</sup> For more than a fortnight the nomination remained before the Senate. Many Senators took part in the heated debate; leaders of each group taunted the other with being 'bludgeoned' into voting for or against Parker by 'manufactured clamor,' and exhibited samples of the letters and telegrams with which Senators were being deluged. Seldom has a Senate issue of such importance been in doubt down to the last few seconds of the final roll-call. Its result was a bitter disappointment to the Administration. For the first time in thirty-six years, a nomination for the Supreme Court was rejected. The vote stood 39 to 41 — 17 Republicans being recorded in the negative. Fear of the resentment of organized labor in the industrialized states and of the Negro vote, especially in the Black Belt of Chicago and in New York City, was believed to be responsible for this result.<sup>4</sup>

<sup>1</sup> In Senate debates and in the press such contracts were constantly stigmatized as 'yellow dog' contracts.

<sup>2</sup> Precisely analogous was the case of *Hitchman Coke & Coal Co. v. Mitchell*, 245 U.S. 229.

<sup>3</sup> April 21. By a vote of 10 to 6.

<sup>4</sup> Less than two months after this rejection of Parker, largely because of the injunction which he had granted in a controversy involving a 'yellow dog' contract, a Senator who had voted against Parker brought in a report adverse to the pending Ship-

Within a few days after the defeat which ended this long contest, the President sent to the Senate in nomination for this same vacancy the name of Owen J. Roberts of Pennsylvania, who had gained national distinction through his services as a special government prosecutor in the oil scandal cases of 1924. When this name was brought before the Senate for consideration, the minority leader, being informed that the nomination had been unanimously approved by the Judiciary Committee, offered no objection. In one minute, without debate or a record vote, the nomination was declared approved.<sup>1</sup>

This immediate and unopposed confirmation presents a striking contrast to the long contests over the Hughes and Parker nominations and the rejection of the latter. Roberts, like the others, was a Republican, and was considered a lawyer of conservative outlook; but he had never been active in politics, nor served as a judge giving decisions sure to antagonize powerful groups. On the contrary, he had shown himself an efficient prosecutor for the Government in litigation in which great national interests were at stake.

The year 1930 may mark a notable turning-point in the history of the Supreme Court. In recent years that body has been making itself the arbiter of complicated economic and social questions which the 'Founding Fathers' never dreamed of. A shrewd analyst of trends in American government, on the day of the Hughes confirmation said of the Supreme Court: 'It has brought itself to the place where legal competence is only one — and perhaps not the most important — test of fitness for service on that Court.'<sup>2</sup> A Senator who — however mistakenly — becomes convinced that a nominee 'is not fit to sit in judgment in a contest between organized wealth and those who toil,'<sup>3</sup> is in conscience bound to vote against him, for the spirit of the Court in interpreting the Constitution and laws is a controlling influence in determining America's future. Conservatives and liberals

stead Anti-Injunction Bill from the Committee on the Judiciary in which its majority distinctly upheld the legality of such contracts, and cited, as Parker had done, the Supreme Court's earlier decisions. 'However distasteful such contracts may be to us, yet the fact remains that the Supreme Court in three cases has held that there is no legislative power, state or federal, to inhibit or outlaw employment contracts providing against union membership.' Report submitted by Senator Steiwer, June 20, 1930.

<sup>1</sup> May 21, 1930. February 24, 1932, the Senate gave prompt and unanimous approval to President Hoover's non-partisan and discriminating nomination of Benjamin N. Cardozo to fill the vacancy on the Supreme Bench caused by the resignation of Mr. Justice Oliver Wendell Holmes. The nominee was Chief Judge of the New York Court of Appeals, a liberal Democrat, and a jurist of the highest eminence.

<sup>2</sup> Frank R. Kent, in *Baltimore Sun*, Feb. 13, 1930.

<sup>3</sup> Norris's characterization of Hughes.

have faced each other from the days of the Federal Convention, but never before 1930 had that issue been so frankly raised as to the confirmation of nominations. But the chief significance of the recent contests in the filling of vacancies upon the Supreme Bench lies not in the struggle between conservatism and liberalism, but in the group pressure which under the Senate's new procedure is likely to determine the fate of nominations. The nominee's entire record gets little chance for fair appraisal. It may prove a more difficult task in the future for the President to find strong men and able jurists, of the caliber of those who have built up the Supreme Court's prestige, who will allow their names to be placed in nomination, if they must first be subjected to an inquisition in committee hearings as to their past records, pertinent or not pertinent to Supreme Court service, as to their personal investments, and as to the opinions which they hold upon complicated and controverted economic and social questions likely to be involved in litigation before the Court, and then must have their nominations made the subject of bitter debate on the floor of the Senate, where racial, sectional, and political considerations may bulk so big that questions of the nominee's character and fitness are half forgotten.<sup>1</sup> Yet it is upon the Senate's verdict as to the nominee's character and fitness that the nation's ultimate reliance must be placed.

<sup>1</sup> For example, in a much-belated defense of the Parker nomination, Attorney-General Mitchell declared that he had read the 125 decisions made by Judge Parker on the Circuit Court of Appeals; that they revealed him as one of the outstanding circuit judges of the country. 'No fair-minded lawyer could read these opinions without being satisfied that Judge Parker has legal ability of the highest order, qualifying him to sit on the highest court.' On not one of these 125 decisions had he been reversed by the Supreme Court. But in the contest over his nomination in 1930, the Senate and the public heard of but one of those decisions and that was one in which he was bound by previous decisions of the Supreme Court; yet that decision was the sole basis of the American Federation of Labor's drive against his confirmation. In like manner a brief passage in one campaign speech — wrongly interpreted, Parker declared — incensed the Negroes, and made Senators in far-away New York and Illinois anxious as to the Negro vote in their campaigns for re-election. The nomination of Roberts raised momentary question, whether the Anti-Saloon League would not marshal its forces in opposition, since it was said that before the Eighteenth Amendment was ratified Roberts had spoken against police powers being incorporated in a constitutional amendment.

Ex-Senator George W. Pepper declared that any danger of bad nominations being made because of the President's lack of knowledge of local conditions 'can be entirely overcome if the Attorney-General, before suggesting a name to the President, will insist upon securing the opinion of the organized bar of the locality in which the judge is to sit.' This was done in the case of Judge Parker, but the testimony of bar associations did not save his nomination from defeat in the Senate. Pepper gave high praise to Attorney-General Mitchell for the courage with which he resisted senatorial selections which he believed unworthy. (*Family Quarrels*, 90.) But another Attorney-General's similar fidelity in withstanding pressure for unworthy nominations for the bench incurred senatorial ill-will which prevented his appointment as a Justice of the Supreme Court (E. Rockwood Hoar, p. 755).

## NOMINATIONS TO THE CABINET

Nominations to the President's Cabinet have usually been confirmed without hesitation. Senator Fessenden declared that this had been considered as a matter of course from the foundation of the Government.

The general idea of the Senate has been, whether they liked the men or not, to confirm them without any difficulty, because in executing the great and varied interests of this great country it is exceedingly important that there should be the utmost harmony between those who are charged with that execution.<sup>1</sup>

To the President alone the heads of departments are responsible, and the President's best friend and his worst enemy may well wish that his responsibility for their selection remain unblurred. Party loyalty alone might have been the strongest motive in 1913 to induce a Republican Senator to vote for the confirmation of William Jennings Bryan as Secretary of State. In 1921, if Democratic Senators, eager for political advantage alone, had been gifted with prophecy, they would gladly have voted to confirm more than one nomination for President Harding's Cabinet. In seven instances, under exceptional circumstances, nominees for the Cabinet have been rejected.<sup>2</sup>

<sup>1</sup> *Cong. Globe*, 384, Jan. 10, 1867. In the early days there was apprehension that with the incoming of a President of different party from that in control in the Senate, there would be a partisan attempt to hold up appointments in order to embarrass the Administration. When Jefferson first became President, at Gallatin's suggestion, it is said, he reappointed General Dexter, who continued to serve as Secretary of the Treasury for two months until Gallatin could be given a recess commission. Three members of the Senate, appointed to Jackson's first Cabinet, retained their seats till their votes had been effective in confirming the nominees for the State and Treasury Departments.

There seems to have been but one attempt to balk the organization of a new administration, and that came — not unnaturally — while the rancor of the Hayes-Tilden contest still continued. When the nominations for the Cabinet were presented, the then unusual motion was made that each be referred to the appropriate standing committee; this was applied even to nominees from the membership of the Senate, to whom under ordinary circumstances senatorial courtesy would have accorded immediate confirmation. But the flood of telegrams of inquiry and protest was so great that after three anxious days all the nominations were confirmed with practically no opposition. Miss M. L. Hinsdale, *The President's Cabinet*, 224–25; 83.

## 2 SENATE REJECTIONS OF NOMINATIONS FOR CABINET POSITIONS

Nominee	Position	President	Date	Vote
Roger B. Taney	Secretary of Treasury	Jackson	June 23, 1834	18 to 28
Caleb Cushing	Secretary of Treasury	Tyler	March 3, 1843	19 to 27
Caleb Cushing	Secretary of Treasury	Tyler	March 3, 1843	10 to 27
Caleb Cushing	Secretary of Treasury	Tyler	March 3, 1843	2 to 29
David Henshaw	Secretary of Navy	Tyler	Jan. 15, 1844	6 to 34
James M. Porter	Secretary of War	Tyler	Jan. 30, 1844	3 to 38
James S. Green	Secretary of Treasury	Tyler	June 15, 1844	Not recorded
Henry Stanbery	Attorney-General	Johnson	June 2, 1868	11 to 29
Charles B. Warren	Attorney-General	Coolidge	March 10, 1925	39 to 41
Charles B. Warren	Attorney-General	Coolidge	March 16, 1925	39 to 46

In 1834, after trying in vain to persuade Duane to 'remove the deposits,' Jackson dismissed him and authorized his Attorney-General, Roger B. Taney, to take charge of the Treasury. Taney's 'servile compliance'—as his opponents in the Senate called it—with Jackson's orders, led to the rejection of his nomination for the office of Secretary of the Treasury, the duties of which he had been performing under a recess commission for several months, and this was also the cause of his rejection, the following year, when first nominated for a position on the Supreme Bench. The ill-will which developed between Tyler and the Senate led to the rejection of four of his nominees for Cabinet offices, in 1843 and 1844. Henry Stanbery's devotion to his chief led him to sacrifice his position as Attorney-General in order to act as one of Johnson's counsel in the impeachment trial. When that contest was over, Johnson's renomination of Stanbery for his old position was rejected by 'a factious and partisan exhibition by Senators which all good men must regret to witness.'<sup>1</sup> Nearly sixty years were to pass before another nomination for the Cabinet was rejected. Fresh from an election which was interpreted as an unprecedented personal victory, in the closing weeks of the Sixty-Eighth Congress President Coolidge sent to the Senate the nomination of Charles B. Warren for Attorney-General. At once serious opposition developed. Though the nomination was favorably reported from the Committee on the Judiciary, no attempt was made to bring it to a vote before the end of the session, March 4, 1925, as it was believed that it would encounter less opposition in the new Senate. Soon after the inauguration Warren was renominated. This led to long and heated debate. March 10 the nomination was brought to a vote at a time when the Republican Vice-President, General Dawes, happened to be absent from the Capitol, and the nomination was rejected because his casting vote was not available.<sup>2</sup>

Apparently banking upon the prestige of his recent victory at the polls, President Coolidge at once accepted the Senate's action as a challenge to his leadership. He sent back the nomination without a word of comment; and March 14 there was issued from the White House a formal statement that he had decided upon no other appointment, but would offer Warren a recess appointment in case the pending nomination were not confirmed.<sup>3</sup> It was further stated that

<sup>1</sup> Gideon Welles, *Diary*, III, 375, June 3, 1868.

<sup>2</sup> Page 235.

<sup>3</sup> 'It is a decidedly militant step to announce to a Senate in session that if it does not grant the desired confirmation, the nominee will be continued in office by the exercise

the President 'hoped that the unbroken practice of three generations of permitting the President to choose his own Cabinet will not be changed . . . and that the President may be unhampered in choosing his own methods of executing the laws.'

This action of the President provoked a storm of disapproval in the Senate, particularly because of what was denounced as his unprecedented threat, while a name was pending, that, if the nomination should not be confirmed, he would leave the position unfilled till he could give to the rejected nominee a recess appointment. The Committee on the Judiciary, now for the third time within a few weeks called upon to report upon the same nomination, reported it adversely, and after a debate in which Senator Borah joined the Democratic leaders in severe condemnation of the inappropriateness of the nomination, while the defense of the nomination was left by the Republicans to men who had been in the Senate but a few weeks, it was rejected by a vote of 46 to 39. A tender of a recess appointment was made to Warren, and declined. Thereupon the President sent to the Senate the nomination of John G. Sargent, a former Attorney-General of Vermont, which was confirmed within three hours of its being laid before the Senate.

It remains to be seen whether in the Warren case the Senate's 'veto' was due merely to the fact that to many Senators the President seemed autocratic and his nominee singularly vulnerable,<sup>1</sup> or

of an authority intended only for other circumstances.' *Boston Herald* editorial, March 16, 1925.

On the question whether it is constitutional for the President to resubmit to the Senate for confirmation the nomination of a person who has already been rejected by the Senate at that same session, see memorandum presented to the Senate by Butler, March 16, 1925, citing many precedents and the opinions of Attorney-Generals. (*Cong. Rec.*, 262-64.) This incident is discussed in detail by ex-Senator Pepper, in *Family Quarrels*, 75-84.

<sup>1</sup> Warren was a lawyer of eminence, who had represented the United States in some difficult litigations, and had served with tact and efficiency as Ambassador to Japan and to Mexico. Had he been nominated for Secretary of State, the nomination probably would have been confirmed. But he had been counsel for the 'Sugar Trust,' in regard to activities later investigated by the Federal Trade Commission as in restraint of trade. The report of the commission's hearings, disclosing the advice which Warren had given, inevitably served as the basis for opposition to his nomination on the ground that a man who held such intimate relations with 'trusts' would not, as Attorney-General, be zealous in the enforcement of anti-trust legislation. Moreover, the Senate's investigation and the forced resignation of Attorney-General Daugherty were of recent memory, and a nomination in the least degree dubious for that office proved a tempting target for the political orator. See G. W. Pepper's defense of the nomination in the Senate, *Cong. Rec.*, LXVII, 228-37, and comment by Lindsay Rogers *The American Senate*, 29.

To the list of nominees for the Cabinet rejected by the Senate may be added the name of a nominee confirmed only after a long contest. Roy O. West began service as

whether it is an earnest of the Senate's determination no longer to allow the President's choice of his advisers to go unchecked. One publicist characterized the Warren vote as a serious blow to the party system.

#### NOMINATIONS TO THE INDEPENDENT COMMISSIONS

One of the most noteworthy developments of our scheme of government in the last half-century has been the tendency of Congress to provide for the control and regulation of our complicated national endeavor by boards or commissions. Several of these powerful agencies are 'independent' in the sense that they have not been made subordinate to any of the executive departments. Each has been created by an Act of Congress, which represented a long struggle to harmonize, or at least to compromise, differing proposals so as to produce a bill that might receive the signature of the President, who had probably been exerting strong pressure for the modification of the measure to make it accord with his own views.<sup>1</sup> The new law may make very specific requirements as to the personnel of the new board, the scope of its powers, and the manner of their exercise.<sup>2</sup>

Under such conditions some degree of friction is sure to develop between President and Senate as to appointments of the board's members. The actual number of the Senate's rejections of nominees for these great commissions has not been great, but the embarrassments and delays, and the consequent uncertainties and inconsistencies in their great fields of regulation, have been of serious moment. To take a single example: The Interstate Commerce Commission is charged with functions — legislative and judicial, as well as administrative — in its regulation of corporations handling traffic over half the railway mileage of the world. It is doubtful if an appointment to

Secretary of the Interior upon a recess appointment, July 25, 1928. Congress convened December 3, but his nomination was not confirmed till January 22, by vote in closed executive session. The details of the balloting, published a few hours later in the press, gave rise to much debate as to the continuance of 'secret sessions' (p. 781).

<sup>1</sup> In the Hawley-Smoot Tariff Act of 1930, the House Bill was quite closely in accord with the known views of the President as to the Tariff Commission, but the Senate was able to force through its amendments, as to the bipartisan makeup of the commission, and as to the scope of its power, as compared with that of the President, under the 'flexible tariff' feature of the law.

<sup>2</sup> Thus, the Tariff Commission must be bipartisan; the geographical distribution of members of the Shipping Board is prescribed; the Federal Reserve Board must include at least one 'dirt farmer'; members of the Farm Board must individually represent a specific branch of agriculture. In 1931, there were not less than seventy specific statutes prescribing fixed limitations as to appointments to various boards and commissions. They are tabulated in G. W. Pepper's *Family Quarrels*, 104-08.

the United States Supreme Court confers upon its recipient more influence over the life of the American people than may be conferred by an appointment to this commission. By the vote of that eleventh man decisions may be made which will affect the comfort and safety, the income and the outgo of families in every hamlet in the land.

The work of every one of these 'independent' commissions impinges upon the field of one or more of the executive departments. This creates anxieties for the President, bound by the Constitution to 'take care that the laws be faithfully executed' and to 'commission all the officers of the United States.' In many ways — at times to the great annoyance of Congress — President Coolidge showed a determination, as far as possible, to make over the personnel of the independent commissions till each should be controlled by a majority whose conception of the commission's functions accorded with his own. To the Tariff Commission, bipartisan by law, he appointed a Democrat who was a protectionist; an obstructionist on the Tariff Commission yielded to the temptation of appointment as Minister to Roumania, and was succeeded by a more co-operative commissioner.<sup>1</sup> Confirmation of one Coolidge nominee for the Interstate Commerce Commission was apparently secured only by an ill-advised concession that in future prime consideration should be given to geographical distribution of its membership. Recess appointments were used to secure for considerable periods the services of men known to be disapproved by the Senate. A member of the Shipping Board, whom the President requested to resign because of his purpose to remove a certain official 'contrary to the understanding I had with you when I reappointed you,' denied that there had been any such agreement, asserted that to use his best judgment was required by his oath of office, and declined to resign.<sup>2</sup> To avoid the repetition of such an embarrassment, when the reappointment of a member of the Tariff Commission was under consideration, he was asked — so he declared — by the President to sign an undated letter of resignation as a condition precedent to his nomination. He refused to sign such

<sup>1</sup> Nomination for some high office has sometimes been suspected to be the reward for a Senator's shift of attitude upon some pending measure. Caraway introduced an interesting — if impracticable — proposal that it be declared the sense of the Senate that it will deny confirmation for office to any Senator, if it is 'apparent' that he has changed his position on any question pending before the Senate in order to aid himself in securing any appointment by the President to such office. (S. Res. 111, Jan. 5, 1926, *Cong. Rec.*, 1095.) It was ordered to lie on the table!

<sup>2</sup> Bert H. Haney. He voluntarily resigned, March 1, 1926.

a letter, and received only a three-months recess appointment, and his name was not sent in again when Congress convened.<sup>1</sup>

For more than a century Presidents have requested the resignation of Cabinet members at will. For the most part the Senate has recognized that practice as justified by the personal responsibility of the Cabinet member to his Chief. But the Senate regards it as quite a different matter that by private compacts prior to nomination the President should seek to dominate members of 'independent administrative agencies' which Congress has created and entrusted with the discharge of duties of the utmost importance.

Inevitably there has been in the Senate a jealous watchfulness to make sure that nominations to these commissions comply with the requirements of the specific statutes creating them. But the conduct of not a few Senators in the consideration of such nominations seems motivated more by narrow partisanship or by a desire to embarrass the Administration or to build up personal 'political publicity capital' than to promote the efficient functioning of the commission.

A large proportion of the regulatory functions of these commissions involves complicated questions of economics, on which Senators hold diverse views. In committee hearings must the nominee give assurance that his views accord with those of each of the questioning Solons? A nominee having exceptional qualifications along a line in which the Interstate Commerce Commission at that time needed strengthening narrowly escaped rejection. Some Senators were believed to oppose him because he was a Catholic and others because he was a native of Vermont and not of the South. Another nominee for the same commission was believed to be unacceptable to some Senators because he came from the South, instead of from Pennsylvania, and to others because he had acquired a reputation as an expert on questions of railway management!<sup>2</sup> A precedent which may well cause some anxiety was the rejection of John J. Esch, co-author of the Railway Act of 1920, for reappointment to the Interstate Commerce Commission in reprisal for his having changed his stand and 'taken the wrong side,' from the standpoint of some of his Senate judges, in an intricate rate controversy which had come before the commission. A nomination for Governor of the Federal

<sup>1</sup> David J. Lewis (p. 559). See Robinson's resolution of Jan. 1, 1925, *Cong. Rec.*, 1063.

<sup>2</sup> That he had contributed articles on railway management to some financial or technical journals seemed to brand him as a minion of the Morgans, or a hireling of Wall Street.

Reserve Board, approved with only two dissents by the Committee on Banking and Currency, was sent back to that committee on demand of Brookhart who claimed a right to question him. The nominee had served under four Presidents in positions of high responsibility, and had been rewarded with high praise by each of them. No one doubted that he would be confirmed. But for hours at a time Brookhart subjected him to an ordeal of the most irrelevant questions, giving the Senator an opportunity to exploit his own economic obsessions and to broadcast irresponsible innuendoes against the nominee.<sup>1</sup> Colleagues on the committee protested, but apparently fearing that he would charge 'jamming through' the hearings, they let him have free rein. After three days of this pother, by a vote of 12 to 3 the committee again approved the nomination, which the Senate, by a vote of 72 to 11, promptly confirmed despite another denunciation from Brookhart on the floor. These incidents are symptomatic of what is proving a serious menace to the successful functioning of these great regulatory commissions.<sup>2</sup> Positions such as those upon the Interstate Commerce Commission, for example, call for hard work; they involve terrific responsibilities; the members' compensation bears no comparison with that of officers and counsel of the corporations which they control. It adds greatly to the President's difficulty in securing the services of men of the requisite character and caliber, when they know that they must run such a gantlet as that to which eminently qualified nominees are now frequently subjected.

#### NOMINATIONS IN THE FOREIGN SERVICE

Nominations in the diplomatic service, whether as resident ambassadors or ministers or as envoys for some special service, have often failed to secure confirmation, for here there has been added to

<sup>1</sup> The Senator even demanded what the nominee would do under certain hypothetical conditions. He refused to answer, saying: 'I would rather forfeit the position than to prostitute my principle. This is the limit I set, and the limit to which I will adhere. There is a price I will not pay . . . I am not here to express opinions. No other candidate for this position was ever subjected to such questions. We could go on here for weeks and months and get nowhere.'

<sup>2</sup> The question has been raised in the press whether, to judge from the Senate's record in dealing with a number of nominations for the Interstate Commerce Commission, it was not the purpose of certain Senators to wreck regulation, in the belief that government ownership and operation must follow. For politicians to make it exceedingly difficult to get capable men upon the present regulatory commission does not afford convincing proof of the wisdom of 'politicalizing' the whole interstate commerce enterprise.

partisan grounds for opposition a jealous intent on the part of the Senate to assert its full share, not only in the making of treaties, but in the control of foreign relations, and in many cases a resentment that the Senate's prior advice and consent had not been sought in relation to the enterprise as well as to the person. In some instances the nominee had already started upon his service under a recess appointment. The most notorious instance was that of Van Buren who in the spring of 1831 had resigned from the office of Secretary of State and been appointed Minister to England. He had already become established in London when Congress convened in December. Through careful manipulation the voting was so arranged in the Senate as to accord to Calhoun the gloating satisfaction of giving the Vice-President's casting vote which would reject the nomination and humiliate Van Buren by bringing him back from London. Benton declared that at this time Clay, Webster, and Calhoun were all aspirants for the Presidency, and that the interest of each of them required that Van Buren be got rid of. The three chiefs thought that for Van Buren 'a senatorial condemnation would be political death.'<sup>1</sup> This rejection made Van Buren first a martyr, then Vice-President, and later President of the United States.

#### 'PRESIDENTIAL AND SENATORIAL OPPUGNATION' AS TO APPOINTMENTS<sup>2</sup>

From time to time each party to the exercise of the appointing power has shown an obstinacy and a choice of methods better cal-

<sup>1</sup> Gallatin was two weeks on his journey to St. Petersburg, when his nomination was rejected. (Page 58, n. 1; Henry Adams, *Gallatin*, 483 ff.) George H. Proffit, recess appointee as Minister to Brazil, had already sailed when his nomination was rejected, only eight votes being given in his favor. (Benton, *op. cit.*, II, 630.)

<sup>2</sup> In not a few instances controversies have arisen over alleged presidential favoritism in the promotion or appointment of military or naval officers. Thus, after the battle of Santiago a recess promotion was given to Commander Schley to the rank of Rear Admiral, and a long series of officers were raised in grade in consequence. But the Senate did not confirm the Schley nomination, and as a result the claims of the others to advances in salary were not granted by the disbursing officer, who took the ground that since Schley's nomination had not been confirmed there had occurred no vacancies to which the subordinates could be promoted.

In the early months of 1917, it was said that some 2000 nominations — postmasters, judges, customs officers — were held up in the Senate because they were banked behind the nomination of Dr. Cary T. Grayson, President Wilson's personal physician, to be Medical Officer with the rank of Rear Admiral, thus jumping him, at the age of 38, over more than 100 officers in intervening grades of the Medical Corps, although of his thirteen years of service there had been only two at sea, most of the rest having been upon the yacht *Mayflower*. The nomination was strongly opposed in the Senate (speech by Lodge, Feb. 24, 1917) and held up all but the most essential appointments through the rest of the session. Soon after the convening of the new Congress in special session,

culated to exasperate the other than to attain that selection, at once 'secure and responsible,' which the Constitution framers anticipated. Thus, Presidents have often aroused the Senate's resentment by making recess appointments which could not fail to prejudice the Senate's subsequent action as to the nominee, the office, or the mission, or by keeping in office by successive recess appointments men whom the Senate had failed to confirm or had even rejected. In tactlessness in the matter of renewed appointments probably no President has excelled John Tyler. Says Benton:

The incessant rejection of these nominations and the pertinacity with which they were renewed, presents a scene of presidential and senatorial oppugnation which had no parallel up to that time, and of which there has been no example since.<sup>1</sup>

To cite one of many examples: At one-thirty on the morning of March 4, 1843, Tyler sent to the Senate the nomination of Caleb Cushing for Secretary of the Treasury. It was promptly rejected by a vote of 19 to 27. From the Vice-President's antechamber in the Capitol, Tyler at once sent back the nomination, saying that his high regard for the wisdom of the Senate had led him to review Cushing's qualifications only to persuade him that the nominee's qualifications were so distinguished as to make it the duty of the President to avail himself of his services in behalf of the country.<sup>2</sup> Without a word of discussion, this conciliatory renomination the Senate rejected by a vote of 10 to 27. Upon receiving the report of this action the angry President scrawled, 'I nominate Cushing as Secretary of the Treasury,' on a bit of paper and sent it back to the Senate. This time the Senate gave its negative by a vote of 2 to 29.<sup>3</sup>

The Senate, on its part, when loath openly to reject a nomination, has often taken no action upon it, or, after long delay, has voted to

by the confirmation of that key nomination, March 15, the dam was broken, and action on the hundreds of others quickly followed. Dr. Grayson had been serving with the rank of Rear Admiral on recess appointment since Aug. 29, 1916. President Harding's nomination of his Marion, Ohio, personal physician to be Brigadier General in the Army Reserve Corps, Medical Section, was confirmed without opposition, but caused much amusement.

<sup>1</sup> Benton, *op. cit.*, II, 629.

Andrew Jackson 'had the satisfaction to witness, what he had anticipated in a letter written to a friend two days before, "the glorious scene of Mr. Van Buren, once rejected by the Senate, sworn into office by Chief Justice Taney, also being rejected by the factious Senate.'" Edward Stanwood, *A History of the Presidency*, I, 189.

<sup>2</sup> *Messages*, IV, 233-34; C. M. Fuess, *Caleb Cushing*, I, 387.

<sup>3</sup> Benton, *op. cit.*, II, 629-31. Yet Tyler had been chairman of the committee which had reported against Jackson's renomination of the four government directors of the Bank, and had himself voted against every one of them.

postpone its consideration indefinitely.<sup>1</sup> At least ten nominations to the Supreme Court have been blocked in this way. When Jackson first nominated Taney for the Supreme Court, the Senate held the nomination for more than six weeks and then, late at night, on the third of March, voted its indefinite postponement. When the clerk of the Senate entered the room at the Capitol where the President was awaiting the end of the session, and announced the Senate's failure to confirm the Taney nomination, the irate President replied 'that it was past twelve o'clock and he would receive no message from the damned scoundrels.'<sup>2</sup> The Senate's nagging requests for the return of its resolutions rejecting or confirming nominations in order that they might be reconsidered have caused Presidents much annoyance. Such a resolution was once declared out of order, on the ground that the Senate's function was completed, and that the question could only be reopened on the President's initiative;<sup>3</sup> but in general such requests have been complied with unless the signing of the commissions had already completed the appointments.<sup>4</sup> In the seventies frequent calls for information as to the date and cause of removals occasioning the vacancies which were to be filled, and as to the proportional distribution of nominations among the several states, with an importunate insistence on form and details, were the 'outward and visible signs of the inward political growth of a new power in the Senate — the attempt by the Senators by combination to make the President a mere clerk to transmit to the Senate as a Constitutional body nominations handed to him unofficially by the individual Senators.'<sup>5</sup>

<sup>1</sup> This policy of delay has often been followed with great persistence and effectiveness in the closing months of an administration. The Senate refused to act upon 38 of John Quincy Adams's nominations, in order that the choices might be made by Jackson. (*Annals of Congress*, VI, part I, 392.) At the end of Tyler's Administration, the hostile Senate refused to act upon his last nominations. (L. M. Salmon, *op. cit.*, 74.) In recent years such refusal has been wholesale and by decree of the party caucus. Thus, in January, 1921, the Republican conference is reported to have agreed that the nominations sent in by President Wilson, numbering into the thousands, should be referred to committees, where the lists would be carefully gone over, and that only such as were found to be non-political would be reported for confirmation, the plan being that after that was accomplished no executive session should be consented to until the end of the session. The Democratic leader acknowledged that the plan was not without justification. 'Only a few of the nominations were confirmed, and these only because of a shortage in certain departments where work was being curtailed because of vacancies.' C. C. Tansill, *op. cit.*, 110.

<sup>2</sup> Charles Warren (*op. cit.*, II, 262), quoting a contemporary newspaper. At the same session Henry A. Wise was three times rejected when nominated as Minister to France.

<sup>3</sup> Dec. 19, 1872. For reconsideration of Power Commission members (p. 825).

<sup>4</sup> Many citations from the Senate *Executive Journal* are given by C. R. Fish, *op. cit.*, 203.

<sup>5</sup> *Ibid.*, 205.

At times each party, the President or the Senate, has threatened to refuse participation in appointment-making, alleging that the interference in the public service was due to the wrongful action or inaction of the other. Thus, in 1834, when the Senate rejected Jackson's nomination of the four government directors of the Bank, he resubmitted the same nominations, explaining in a long message that he could see no other ground for the Senate's action than the directors' compliance with his orders to secure information as to the conduct of the Bank. He therefore renominated 'these faithful public servants,' adding:

If it shall be determined by the Senate that all channels of information in relation to the corrupt practices of this dangerous corporation shall be cut off, and the Government and country left exposed to its unrestrained machinations against the purity of the press and public liberty, I shall, after having made this effort to avert so great an evil, rest for the justification of my official course with respectful confidence on the judgment of the American people.<sup>1</sup>

Popular opinion was turning toward the President, and the Bank's charter was not renewed.

The Senate has at times asserted that it was its duty not to confirm the President's nominations in cases when he had refused compliance with its request for information relative to the removal of the previous incumbents. Thus, in 1886, after weeks of debate on the report of its Committee on the Judiciary on 'The Relations between the Executive and the Senate,' by a vote of 30 to 29, the Senate adopted a series of resolutions declaring, among other things,

That it is, under these circumstances, the duty of the Senate to refuse its advice and consent to proposed removals of officers, the documents and papers in reference to the supposed official or personal misconduct of whom are withheld by the Executive or any head of a Department, when deemed necessary by the Senate, and called for in considering the matter.<sup>2</sup>

While these resolutions were under debate, in a message to the Senate President Cleveland had declared:

Neither the discontent of party friends nor the allurements constantly offered of confirmation of appointees conditioned upon the avowal that the suspensions have been made on party grounds alone, nor the threat

<sup>1</sup> *Messages*, III, 41-48. John Tyler brought in the committee's long report, adverse to these nominations, and they were rejected, 30 to 11. May 1, 1834, Senate *Executive Journal*, IV, 394-97.

<sup>2</sup> S. Rept. 135, 49th Cong., 1st sess. Submitted, Feb. 18, 1886; its resolutions adopted, March 26, 1886. *Cong. Rec.*, XVII, 1584-87; 2813-14.

proposed in resolutions now before the Senate that no confirmations will be made unless the demands of that body be complied with, are sufficient to discourage or deter me from following in the way which I am convinced leads to better government for the people.<sup>1</sup>

#### RECESS APPOINTMENTS

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In three different sections the Constitution refers to 'vacancies which *happen*'.<sup>2</sup> It may be doubted if it contains any other phrase, the ambiguity of which might so easily have been removed, that has given rise to such long-winded controversy.

Anxious to avoid trouble with the Senate, before making a recess appointment of an envoy extraordinary to negotiate a treaty President Washington sought the advice of Hamilton and Jay. They agreed that there was 'no power in the President to make such an appointment without the concurrence of the Senate.' At another time, foreseeing that all the positions provided by a military bill passed near the end of a session might not be filled in time to secure the Senate's confirmation before adjournment, Washington specially requested authority to make the appointments during the recess.<sup>3</sup> On several occasions Congress, anticipating such a contingency, made provisions in the bill itself for such appointments during recess.<sup>4</sup>

During Madison's second Administration the question of recess appointments first became the subject of heated debate. For it was during the Senate's recess that Gallatin and his two colleagues had been commissioned to negotiate and sign a treaty of peace with the United Kingdom of Great Britain and Ireland under the mediation of the Emperor of Russia. Gallatin was already two weeks on his journey to St. Petersburg before the Senate convened. At this time he was Secretary of the Treasury, a post which he had held for twelve years and did not wish to resign. This mission to Russia was 'regarded

<sup>1</sup> *Messages*, VIII, 375, March 1, 1886.

<sup>2</sup> Art. I, sec. 2, par. 4; art. I, sec. 3, par. 2; art. II, sec. 2, par. 3.

<sup>3</sup> Speech of Senator Bibb, March 30, 1814. *Annals of Congress*, 694-705.

<sup>4</sup> *Statutes at Large*, I, 200, Act of March 3, 1791. *Annals of Congress*, 749, Act of March 3, 1799. In the Senate, March 7, 1814, referring to the former of these Acts, Senator Gore declared: 'The practice has been invariably continued since.'

as a merited rest' for the Secretary of the Treasury. After the Senate committee's abortive attempt to secure a conference with the President upon this matter, Gallatin's nomination was rejected.<sup>1</sup> A few days later Senator Gore introduced a series of resolutions declaring that in the opinion of the Senate the granting of commissions to the three envoys was not authorized by the Constitution, and that the Senate 'do hereby solemnly protest' against it as an act 'in the performance of which the power of the Senate has been disregarded.'<sup>2</sup> In advocating the adoption of these resolutions, Gore insisted that 'if a vacancy happened in an office, the office must have been before full.... If a vacancy exist prior to, it does not happen in the recess of the Senate.' He declared that if a recess appointment could be made to an office never before filled, by reporting this nomination near the end of the next session of the Senate, and, if it were rejected, leaving the position vacant until the next recess and then issuing to his favorite a new commission, the President might commission an officer — and, if one, all officers — and continue him in office as long as the President might please, 'not only without, but contrary to the advice and consent of the Senate, a department of the Government constituted by the Constitution an essential branch in the power of appointment.'<sup>3</sup>

On the other hand, Senator Bibb denied that the word 'vacancy,' in its application to office, implied a previous filling. 'A vacant office is an office unoccupied.' The office of the envoys in this case could not exist until the offer of Russian mediation, which was first made during the recess.<sup>4</sup> Horsey insisted that Gore's gloomy prediction assumed an abuse of power on the part of the Executive far more likely to arise in connection with the unquestioned power of removal than the filling of new offices.<sup>5</sup> Gore's resolutions were not brought to a vote.

In 1834, after twenty years of further observation, Madison wrote:

Another innovation of great practical importance espoused by the Senate relates to the power of the Executive to make diplomatic and

<sup>1</sup> Pages 730-31.

<sup>2</sup> Senate *Executive Journal*, II, 415, July 29, 1813. Reintroduced, Feb. 25, 1814, *ibid.*, 500.

<sup>3</sup> *Annals of Congress*, 652, March 7, 1814. See speeches by Senator Tazewell, in which he repeatedly argued that 'the President alone has no authority to make an original appointment to a statutory office.' Feb. 22, 1831, *ibid.*, 225; April 20, 1826, *ibid.*, 607.

<sup>4</sup> March 7 and 30, and April 12, 1814, *ibid.*, 651-57; 694-705; 742-59.

<sup>5</sup> *Ibid.*, 707-22. He appended a list of original appointments made by Presidents during recess of the Senate, from 1792 to 1814.

consular appointments in the recess of the Senate. Hitherto it has been the practice to make such appointments to places calling for them, whether the places had or had not before received them.... It is now assumed that the appointments can only be made for occurring vacancies; that is, places which had been previously filled. The error lies in confounding foreign missions under the law of nations with municipal officers under the local law.... The doctrine of the Senate would be as injurious in practice as it is unfounded in authority. It might and probably would be of infinitely greater importance to send a public minister where one had never been sent, than where there had been a previous mission.... The new doctrine involves a difficulty also in providing for treaties, even treaties of peace, on favorable emergencies, the functionaries not being officers in a constitutional sense, nor perhaps ministers to any foreign government.<sup>1</sup>

In 1863, recess appointments were the subject of an elaborate report by Senator Howard from the Committee on the Judiciary, which took the same view as had Gore, forty years earlier, that a President might not appoint to fill vacancies which 'have not occurred within the recess of the Senate.'<sup>2</sup> The report was accompanied

<sup>1</sup> Madison, *Letters and Other Writings* (Phila., 1865), IV, 369, letter to Edward Coles, Oct. 15, 1834. J. Q. Adams declared: 'I considered the Executive competent to institute a new mission and appoint Ministers during the recess of the Senate, but that when the Senate were in session, they must be nominated.' (*Memoirs*, VII, 96.) How closely divided was Senate opinion on this subject is indicated by the fact that a resolution protesting against the President's assuming a power to appoint to an original vacancy during the recess of the Senate, after long debate, was tabled by a majority of two.

From the voluminous discussion of the meaning of 'happen,' the following opinions are among the most clarifying:

"Happen" may mean "happen to take place," that is to "originate"; under which sense the President would not have the power to fill the vacancy. It may mean, also, without violence to the sense, "happen to exist," under which sense the President would have the power to fill it by his temporary commission. Which of these two senses is to be preferred? The first seems to me most accordant with the letter of the Constitution; the second, most accordant with its reason and spirit.... If the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the Constitution will be sacrificed to a dubious construction of its letter.' Attorney-General William Wirt, in opinion given to President Adams, 1823. Quoted in Senate Committee Report 80, 37th Cong., 3d sess.

'If you fill the ellipsis with the words "to exist," the authority of the President is very clear. If you fill it with the words "to occur," it is equally clear that the President would not have the power.... The law officers of the Government... have construed the words used in the Constitution to mean "vacancies happening to exist.'" Reverdy Johnson in the Senate, Jan. 11, 1867. *Cong. Globe*, 409.

This topic has been ably discussed, with many illustrations and citation of authorities, by C. C. Tansill, *The Appointing Power of the President*, ch. V.

<sup>2</sup> 37th Cong., 3d sess., Senate Reports of Committees, 80. In presenting the report Senator Howard said: 'We think... this period [when a vacancy "happens"] must have its inception point after one session has closed and before another session has begun.' The committee emphasized the purpose of the Senate's concurrence at all, namely, to secure their advice and consent as to the quality of the appointees, as the consideration of prime importance.

by statements from the heads of several departments. In justifying certain classes of appointments which had been made in the Department of State, Secretary Seward quoted the opinion of Attorney-General Caleb Cushing (May 25, 1855), which, citing the formal opinions of three of his predecessors, declared:

They concur in the general statement that, howsoever a vacancy happens to exist, if it exist, it may be filled by temporary appointment of the President. They well agree that it is the true spirit of the Constitution, to have the offices, which Congress indicates to be needful by creating them, filled, though provisionally, rather than to remain vacant, or to force a special call of the Senate. They contradict most expressly the supposition, that, in order to the existence of a vacancy, it needs that an office existing shall have been once filled by confirmation of the Senate or commission of the President.<sup>1</sup>

Recess appointments in the hands of 'an ambitious corrupt or tyrannical Executive' have not served to subvert Government, as Senator Howard professed to dread, but they have been the basis of long-drawn-out controversies in which a pertinacious President has sought to make permanent nominations which were obnoxious to the Senate.

During the recess of the Senate in the summer of 1903, President Roosevelt made two temporary appointments which he knew would encounter strong opposition — that of Leonard Wood to be Major-General, criticized because it promoted the President's personal friend over the heads of many other army officers, and that of W. D. Crum, a Negro, to be Collector of the Port of Charleston, South Carolina, a community in which such an appointment was highly repugnant to most of the citizens who would have occasion to do business with the holder of that office. Under the Constitution these appointments and commissions lapsed at the end of the next session of the Senate — at noon, December 7. At that same moment the next regular session began. Almost immediately thereafter, a messenger from the President brought the announcement that in the recess between the two sessions the President had reappointed and commissioned these two men, and divers others, to the positions they had been filling. Had he, instead, resubmitted their nominations, they would, of course, have been out of the offices and without the pay of those offices, until the Senate should consent to their appointment. The Senate authorized its Committee on the Judiciary to report what

<sup>1</sup> Seward had reported to the committee a list of 29 appointments, mostly of consuls. Cushing's opinion is to be found in *Opinions of Attorney-Generals*, VII, 223.

constituted 'a recess of the Senate' within the meaning of the Constitution.<sup>1</sup> It was not to be expected that a committee majority of his own party, when a presidential campaign was already under way, would bring in a report not sustaining the President. So the country waited fourteen months before it received the committee's report that in its opinion 'a constructive recess' of Congress during the 'infinitesimal fraction of an indivisible period of time . . . constitutes a heavy draft upon the imagination' and is 'impossible.'<sup>2</sup> In the meantime, during the regular session, the Senate had confirmed the appointment of Wood, but had failed to take action on that of Crum. At the end of the session President Roosevelt again gave him a recess appointment, and when his nomination, once more submitted at the next session of the Senate, was rejected, named him for a position in the District of Columbia, to which appointment the Senate at last gave its consent.

Before the adjournment of Congress on March 3, 1915, President Wilson had nominated George Rublee for membership on the Federal Trade Commission for the term of three years.<sup>3</sup> The Senate did not confirm the appointment, as it was strenuously opposed by Senator Gallinger of New Hampshire, the nominee's state. A recess appoint-

<sup>1</sup> Dec. 11, 1903. A letter from Secretary of War Root to the committee called attention to the fact that similar recess appointments in the Regular Army had been made. No action was taken by the Senate to displace Crum. *Cong. Rec.*, Feb. 4, 1904; W. W. Willoughby, *The Constitutional Law of the United States* (1929), 1509.

<sup>2</sup> March 2, 1905, *Cong. Rec.*, 3823.

Said one critic: 'Since the republic came into existence, no President has ever pro- pounded a more silly pretext for an improper and unlawful action.' (Editorial, *Boston Herald*, March 1, 1905.) The example proved contagious. In the House an Urgency Deficiency Bill was introduced, for an extra payment of mileage because of this 'constructive recess.' It was supported by many members including a future Vice-President. Underwood criticized it effectively. (Jan. 26, 1904.) The teller vote was announced: 'Ayes, 167; noes, none.' Attorney-General Daugherty, in a formal opinion, held that the President has large, but not unlimited, discretion in determining, when the Senate has adjourned to a specified date, whether 'in a practical sense' that body is in session so that its consent can be given to appointments requiring confirmation. 67th Cong., 2d sess., S. Doc. 157, transmitted to Senate, March 8, 1922.

Another Roosevelt practice which caused resentment in the Senate was that of failing to make any other nomination after the Senate had refused to confirm a renomination. A Florida postmaster, whose renomination had been rejected, continued to hold his office for a year, inasmuch as, by statute, a postmaster continues in office until his successor is appointed. In 1925, Coolidge renominated a federal judge for the First Alaska District, but withdrew the nomination on learning that it was likely to be reported adversely, and made no other nomination. A year and a half later, a resolution was introduced directing the Committee on the Judiciary to report whether 'the said Thomas M. Reed is legally holding said office, or whether he is an intruder and usurper . . . and whether any legislation is required by Congress to deal with said matter, or with situations which may arise of a similar character.' (Feb. 8, 1927, S. Res. 347.) It was reported 'without amendment,' but was not acted upon. A similar resolution, 124, in the next Congress met the same fate.

<sup>3</sup> Page 741.

ment was then made under which Rublee continued to serve without pay until the end of the next session of the Senate, September 8, 1916. Meantime his renomination had been referred to the Committee on Interstate Commerce, which for months held it, until Gallinger served notice that if it were not reported within a specified time he would move to discharge the committee from its consideration. It was then reported favorably, but was defeated, May 15, 1916. Upon reconsideration, a week later, it failed of confirmation by a tied vote, and the President induced Rublee to continue to serve on that recess commission until September, when Congress adjourned, at the end of a session which had been exceeded in length but four times. He had been a member of the Federal Trade Commission for a year and a half, though his nomination had never been confirmed by the Senate.

A more recent instance duplicates in many respects the case of Doctor Crum. President Harding, November 4, 1922, gave a recess appointment to Walter L. Cohen, a Negro — formerly Republican State Chairman — as Comptroller of Customs for the New Orleans District. This commission lapsed at the end of that special session of Congress, December 4. The President then submitted Cohen's nomination to the Senate. Meeting strong opposition from both the Louisiana Senators, it was rejected. May 12, 1923, he was given a second recess appointment, under which he would continue to serve till the end of the next session of the Senate, in the summer of 1924. When the 68th Congress convened, in December, 1923, President Coolidge's renomination of Cohen opened a long and bitter contest. February 18, 1924, it was rejected by a vote of 37 to 35.<sup>1</sup> After a conference between the President and Republican leaders it was intimated that no other nomination for that post would be made during that session, and that Cohen would continue to serve till summer, when he would be given another recess appointment.<sup>2</sup> A

<sup>1</sup> Press reports (March 18, 1924) asserted that this result was brought about by a secret deal made by Southern Democratic Senators with Brookhart and others, whereby 'confirmation would be blocked in return for which the Democrats pledged themselves to support Brookhart for head of the Daugherty investigating committee, and to protect Senators from border states against publicity as to the roll-call.' The introduction of a resolution calling for making that roll-call public caused great perturbation. Rather than face a vote on that resolution, and incur the resentment of prospective Negro voters in the coming presidential election, certain Senators preferred to reconsider the vote of Feb. 18, and to confirm the nomination. (*Washington Post*, Feb. 27, 1924.)

<sup>2</sup> The political significance of this matter was deemed of so much significance that the Chairman of the Republican National Committee was brought into the President's conference with Cohen and Republican Senators.

March 17, the roll-call was in secret session. In other words, for nearly a year and a half an appointee, obnoxious to the community in which he served, was kept in office

month later, however, Cohen's nomination was confirmed by a vote of 39 to 38, and he was duly appointed to the office the duties of which he had been performing without pay for nearly a year.<sup>1</sup>

#### SENATE PROCEDURE IN HANDLING NOMINATIONS

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The practice of referring nominations to committees did not at once become general.<sup>2</sup> In February, 1829, Johnston declared that it had been the usual practice to lay nominations on the table for some days, and that when they were called up for consideration, there was an exchange of information as to the character and qualifications of the nominee, and upon these statements the Senators based their action.<sup>3</sup> He said that nominations had been referred when the

in spite of senatorial opposition, until secret confirmation could be secured as the price for other secret deals.

In the cases of Crum, Rublee, and Cohen the President appointed in a subsequent recess a man whom he had nominated in a previous one, and whose nomination had been rejected at the intervening session of the Senate. Commenting on this practice, Mr. Justice Miller said that he did not deny the constitutional power of the President to fill the vacancy thus, but only its propriety. Miller, *On the Constitution of the United States*, lecture III, cited by C. C. Tansill, *The Appointing Power of the President*, 151.

It is interesting to note that the framers of the Constitution of the Confederate States of America copied from the section of the United States Constitution the provision as to recess appointments and the expiration of commissions given to such appointees. They added, however: 'But no person rejected by the Senate shall be reappointed to the same office during their ensuing recess.' (Art. II, sec. 4.)

<sup>1</sup> *Payment to Recess Appointees.* The law (Rev. Stat., sec. 1761) provides: 'No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session, and was by law required to be filled by and with the consent of the Senate, until such appointee has been confirmed by the Senate.'

It is not unusual, however, for Congress, 'notwithstanding' this specific provision, to make special appropriation for a recess appointee. This was done in the case of George Rublee, without Senate confirmation, and also in the case of William J. Tilson, who, without Senate confirmation, held the office of District Judge from July 10, 1926, to March 17, 1928. (Approved, May 29, 1928.)

<sup>2</sup> For Washington's views as to the proper mode of co-operation between the President and the Senate, as to the making of appointments, see pp. 55-56.

<sup>3</sup> Page 56. Hillhouse (April 12, 1808) had advocated an amendment to the Constitution requiring the advice of both the Senate and the House of Representatives to appointments to office, where other provision shall not be made by law. He acknowledged that this would 'make it somewhat more difficult to obtain an office, but that will be more than countervailed by the additional guard which it will afford against the introduction of bad men.... The knowledge of the Senate is also very limited, as every day's experience shows; the Senators being obliged individually to make application to members of the other House for information.'

nominee was unknown; when charges were preferred; when the President submitted the renomination of an officer who had the disbursement of public money, in order that it might be ascertained how his accounts stood; and ministers in whose case reference had been made to the Committee on Foreign Relations, that inquiry might be made into the expediency of the particular missions.<sup>1</sup> He declared that no reference of a judicial appointment was recollect, and he thought the innovation would introduce a very inconvenient practice.<sup>2</sup>

Since 1868 nominations are referred to 'the appropriate committee,' unless otherwise ordered. Senatorial courtesy usually causes reference to be waived in the case of the nomination of past or present members of the Senate, and until recently nominations for Cabinet positions were acted upon without being referred.

When a nomination has been referred, its investigation is often assigned to a subcommittee, which may conduct hearings, at which the nominee himself may be asked to appear. When the Federal Reserve Board was first constituted, one nominee was subjected to such a grilling, apparently for the 'investigation's' publicity value to the inquisitors, that the nominee next in line, an eminent banker, gave it to be understood that his name must be withdrawn if such bullyragging were to be expected. It would seem that some restraint was brought to bear upon the exuberance of certain members of the committee, for his examination was more pertinent and dignified. Instead of accepting an invitation to appear before such a committee, nominees have at times promptly requested the President to withdraw the nomination.<sup>3</sup>

Either because of perplexity as to the proper decision, or because the majority wishes to balk action, the committee may hold the nomination under advisement for a long time — till the expiration of

<sup>1</sup> For discussion of earlier controversies over nominations to foreign posts, see Senate *Executive Journal*, III, 502; John Quincy Adams, *Memoirs*, VII, 96.

<sup>2</sup> The situation was thoroughly political. J. J. Crittenden, a devotee of Clay, had been nominated to the Supreme Bench by President J. Q. Adams. The Senate was Democratic, and did not propose to vote on any nominations — least of all the nomination of a Whig for a life office — in the few remaining weeks of Adams's term. So, despite serious delay to the public business because the Court was crippled by the great age and illness of some of its members, this committee held the nomination for six weeks, and then, assigning no reasons, reported that it was inexpedient to act upon it — a recommendation which the Senate made its own by a vote of 23 to 27, Feb. 12, 1829, *Annals of Congress*, 91; Charles Warren, *op. cit.*, II, 162 and n.

<sup>3</sup> Thus, G. B. Christian, nominee for the Federal Trade Commission, wrote to President Coolidge as reported in press, Feb. 21, 1924, thus avoiding coming before the Interstate Commerce Committee, after question had been raised as to his record and qualifications.

the Congress, or till incited to action by threat of a motion to discharge the committee from consideration of the nomination, in order to bring it directly to the Senate. In any case, its report may be 'without recommendation.'

Until recently the Senate rules permitted publication of the fact that a nomination had been made,<sup>1</sup> and that it had been confirmed or rejected; but they have enjoined secrecy as to 'all information communicated or remarks made by a Senator when acting upon nominations concerning the character or qualifications of the person nominated; also all votes upon any nomination.'<sup>2</sup> These restraints might be avoided, if by vote of the Senate it was decided that a certain nomination should be considered 'in open executive session,' but a motion to that effect could only be made, discussed, and voted on when the Senate was in executive session.<sup>3</sup> As early as 1841, Senator Allen of Ohio offered a resolution, which he renewed in four successive sessions, that the rule requiring that the Senate close its doors when in executive session be rescinded except as to the action of the Senate on treaties. Twelve years later, Salmon P. Chase took up the fight for open sessions. In 1886, Logan and Platt made a determined effort to secure consideration of and action upon executive nominations in open session, but, at the end of long debate, in which the opposition was led by Hoar and Morrill, a resolution to that effect was defeated by a vote of more than four to one.<sup>4</sup> April 3, 1914, after a long fight in executive session had resulted in the confirmation of Winthrop M. Daniels as a member of the Interstate Commerce Commission, in open session La Follette, saying that he regarded the nomination as connected with legislation since that commission construes the legislation enacted by Congress, declared that in future he meant to defy the rules of the Senate and to discuss publicly legislation (and nominations associated with legislation) not affecting foreign relations. It was announced that eight other Senators would maintain that attitude.<sup>5</sup>

<sup>1</sup> Rule 38, sec. 2.

<sup>2</sup> In the days of President J. Q. Adams even the fact that a nomination had been made was supposed to be kept secret. He commented sarcastically on the fact that nominations which he had sent to the Senate in confidence were announced in Washington and Baltimore papers the next morning, adding: 'If this government can keep any secrets, it is not those for which faction and envy are on the watch.' *Memoirs*, VIII, 6.

<sup>3</sup> Rule 36, sec. 2. H. H. Gilfry, *Senate Precedents*, I, 256. For such a motion a two-thirds vote is required.

<sup>4</sup> Gilfry, *Senate Precedents*, II, 255.

<sup>5</sup> Bristow, Cummins, Clapp, Kenyon, Norris, W. L. Jones, Gronna, and Poindexter. The press reported the general opinion that there would be no attempt to take action against Senators who should so disregard the rule of secrecy.

In recent years the question whether a given nomination shall be considered in open session has often given rise to many hours of heated debate. Thus, February 4, 1925, the Senate wrangled for two hours over the question whether the doors should be opened for consideration of the nomination of Harlan F. Stone to the Supreme Court. On the following day, after six hours of debate in open executive session, the nomination was confirmed by a vote of 71 to 6. There was evidently a growing willingness to accord open sessions for the consideration of nominations in which public interest was greatly aroused.<sup>1</sup> That publicity is of political importance is shown by the fact that the mere introduction of a resolution that the injunction of secrecy be removed from the roll-call by which Walter L. Cohen's nomination for Collector of the Port of New Orleans was rejected (37 to 35), led to a reconsideration of that vote, and, despite the protest of both Louisiana Senators and their appeal to senatorial courtesy to the confirmation of the nomination.<sup>2</sup> Modification of the secrecy rule in 1929 is discussed elsewhere.<sup>3</sup>

The Senate may send a nomination back to a committee for reinvestigation.<sup>4</sup> Often, by subsequent vote of the Senate, the injunction of secrecy is removed from some part of the proceedings of the Senate in acting upon nominations. Thus, a century ago the vote was made public by which the Senate had confirmed the nomination of Henry Clay for Secretary of State,<sup>5</sup> and April 16, 1921, similar action was taken as to the nomination of Ambassador Harvey.

At the end of the Senate's deliberation the question takes the form: 'Will the Senate advise and consent to this nomination?' Unless by unanimous consent, this question cannot be put on the day when the nomination is received, nor on the day when it is reported by a committee. Nominations, neither confirmed nor rejected during the session

<sup>1</sup> In the case of the nominations of special counsel for the prosecution of the 'Oil Lease Cases,' open session was agreed to by a vote of 69 to 2 on Pomerene's nomination, and by unanimous consent on Roberts's. Warren's nomination was considered in open session.

<sup>2</sup> Page 775.      <sup>3</sup> Page 670.

<sup>4</sup> Thus, January 26, 1925, in executive session the Senate sent back to the Committee on the Judiciary the nomination of H. F. Stone. This unusual action was taken upon a unanimous-consent agreement, proposed by the Republican leader of the Senate, after consultation with President Coolidge, Senator Butler (Chairman of the Republican National Committee), and Attorney-General Stone, who had recently secured from a grand jury in the District of Columbia an indictment against Senator Wheeler, against whom another indictment on similar grounds was already pending in Montana. The object in sending the nomination back to the committee was said to be 'to avoid a "trial" of Wheeler in the Senate.'

<sup>5</sup> *Niles's Weekly Register*, March 12, 1825.

in which they are submitted, die with that session, and all nominations pending when the Senate adjourns or takes a recess for more than thirty days cannot again be considered unless again sent to the Senate by the President.<sup>1</sup> A motion for reconsideration of a nomination which has been confirmed or rejected may be made on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate.<sup>2</sup>

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<sup>1</sup> For requirements as to the reconsideration of a nomination, and for requests to the President for its return, see Rule 38, secs. 3 and 4.

<sup>2</sup> For discussion of 'attempted removal under guise of reconsideration,' see p. 824.

## XIV

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THE SENATE'S RELATION TO REMOVALS

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The consent of that body (the Senate) would be necessary to displace as well as to appoint.

ALEXANDER HAMILTON  
(*The Federalist*, No. 77, April 4, 1788)

If you say that a bad man in office shall not be displaced but by and with the advice and consent of the Senate, the President is no longer answerable for the conduct of the officer; all will depend upon the Senate. You hereby destroy a real responsibility without obtaining even the shadows.

JAMES MADISON  
(In House debate, May 19, 1789)

Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers — a conclusion confirmed by his obligation to take care that the laws be faithfully executed.

CHIEF JUSTICE WILLIAM H. TAFT  
(In *Myers v. United States*)

The arguments drawn from the executive power of the President and from his duty to appoint officers of the United States . . . to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spiders' webs inadequate to control the dominant facts.

MR. JUSTICE HOLMES  
(In *Myers v. United States*)

To deny to the President the right to remove an executive official unless Congress assented would be to put a 'To Let!' sign upon the White House.

SOLICITOR-GENERAL JAMES M. BECK  
(In *Myers v. United States*)

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# XIV

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## THE SENATE'S RELATION TO REMOVALS

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### POWER OF REMOVAL AS CONSTRUED IN THE FIRST CONGRESS

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LATE in the sessions of the Federal Convention Gouverneur Morris, seconded by Charles Pinckney, had introduced a series of propositions calling for six secretaries of executive departments each of whom should 'be appointed by the President and hold his office during pleasure,' and, further, that they should 'be liable for impeachment and removal from office, for neglect of duty, malversation, or corruption.'<sup>1</sup> Such impeachment was obviously to be supplementary to the President's power of removal. Though at once referred to the Committee of Detail, these proposals found no place in its later reports nor in the final draft of the Constitution, but they are significant of the opinion of two influential members of the Convention.

The Constitution left it an open question, what should be the scope of the power of removal, and by whom it should be exercised. The particular question as to the allocation of this power aroused no special interest during the struggle over ratification. In the *Federalist* it fell to Hamilton to expound and justify the provisions as to the appointing power. In the introductory paragraph of his discussion he says:

It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that

<sup>1</sup> Aug. 20, 1787, Madison, *Debates*, 428-29.

body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the Officers of the Government as might be expected, if he were the sole dispenser of offices. Where a man, in any station, had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that the discountenance of the Senate might frustrate the attempt, and bring some degree of discredit on himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body, which from the greater permanency of its own composition, will, in all probability, be less subject to inconstancy, than any other member of the Government.<sup>1</sup>

The most striking thing about this paragraph is the casualness of its statement as to a question soon to be fiercely controverted. Yet fifteen months had not elapsed when the power of removal had been the subject of searching debate in both Houses of Congress<sup>2</sup> and Hamilton's construction of this feature of the Constitution had been rejected in favor of another, deliberately implied in an Act of Congress, which was to withstand all attack for more than seventy-five years, and, after a brief period of modification, was again to receive the sanction of Congress, and later the affirmation of the Supreme Court.

In the First Congress discussion of the power of removal was precipitated by the introduction into the House of a bill providing for the organization of the Department of Foreign Affairs. Four different views were advanced in the House as to the exercise of the power of removal warranted under the Constitution. Two may be dismissed with but brief mention. It was held by some that it was the intent of the Constitution that impeachment should be the sole method of removal. But the inadequacy of this process as applied to an ever-increasing host of federal officers was so apparent that this construction won no converts.<sup>3</sup> Nor did any considerable number favor the second view, that, since Congress was empowered to vest

<sup>1</sup> No. 77, April 4, 1788 (Lodge ed.), 476-77.

<sup>2</sup> Pages 58-62. Debate in the House, *Annals of Congress*, I, 474-608; 613.

<sup>3</sup> The main argument advanced against the impeachment theory in this debate was drawn from the length of the trial of Warren Hastings, then in progress. (Professor L. M. Salmon, *op. cit.*, 19, n. 2.) Madison saw clearly another serious objection: 'independent of every other consideration, the primary objects on which the Senate are to be employed seem to require that their executive agency should not be extended beyond the minimum that will suffice. As the Judiciary tribune which is to decide on impeachments, they ought not to be called on previously for a summary opinion on cases which may come before them in another capacity.' Letter to Edward Pendleton, July 15, 1789.

the appointment of such inferior officers as they might think proper in the President alone, in the courts of law, or in the heads of departments, Congress could therefore make what provision it chose as to such officers' removal, that 'being comprised within the power of appointment.'<sup>1</sup>

The two theories over which the real clash came were, first, that the power of removal was to be exercised by the President by and with the advice and consent of the Senate, and, second, that that power was vested in the President alone. No sooner was the debate started in Committee of the Whole than White of Virginia laid down the thesis that if the Senators are associated with the President in the appointment, 'they ought also to be associated in dismission from office'; and Smith immediately cited in its support the paragraph above quoted from Hamilton's exposition of the appointing power in the *Federalist*. Gerry insisted that state precedents did not indicate that appointment or removal was distinctly an executive power. To allow the President alone to remove would be destructive of the intention of the Constitution expressed by giving the Senate a share in appointments, since the same qualities of mind are needed in checking a President in removing as in appointing officers.<sup>2</sup> Stone asserted that capable and efficient men would decline to accept office if removable at the caprice of one man. Great apprehension was expressed that the President, if unchecked in removal, would become despotic, and fantastic pictures were painted of the raids which he might make upon the Treasury.<sup>3</sup>

In supporting the view that the power of removal was vested in the President, Madison made no reply to the *Federalist* construction, which had escaped challenge only a few months before. He and his supporters insisted that removal was an executive power, necessarily implied in the power to nominate, which belonged to the President alone, the Senate having a negative only after nominations were made. They emphasized the impossibility of the President's fulfilling his constitutional duty, to 'take care that the laws be faithfully executed,' if hampered by the impossibility of removing faithless or incompetent agents. They declared that the Senate's share in the power of removal would impair the principle of the separation of powers and make the

<sup>1</sup> This argument has been much stressed in recent controversies (pp. 810–11; 829–30).

<sup>2</sup> *Annals of Congress*, I, 491.

<sup>3</sup> *Ibid.*, Remarks of Page (509); Jackson (574–77); and the ridicule which Scott turned upon such fears (553). Professor L. M. Salmon's comments, *op. cit.*, 21, n.

President a figurehead. The President's removal of worthy men was not to be feared, for, said Madison, 'I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.'<sup>1</sup>

In the House Madison's view prevailed. The Act was passed by a vote of 29 to 22, in a form which avoided any suggestion that this Act of Congress was conferring the power of removal upon the President alone, but at the same time contained a deliberately implied recognition of the exclusive power of removal, as belonging to the President as a matter of right under the Constitution.<sup>2</sup> Of the fifty-one members of the House who took part in this momentous vote, construing the Constitution at the end of what William M. Evarts declared to be 'decidedly the most important and best considered debate in the history of Congress,' eight had been members of the Constitutional Convention and six had taken part in its debate.<sup>3</sup> Of these eight, three made it clear by their votes that they believed that by the Constitution the power of removal was vested in the President alone; three others favored his exercising that power unchecked by the Senate, but may have thought it should be given him by legislative grant; only two of the former members of the Convention favored a senatorial check upon removals.<sup>4</sup>

As the Senate's sessions were held behind closed doors, reliance for information upon this critical debate must be placed upon very inadequate sources — the daily comments, spicy but far from fair-minded, in Maclay's *Journal*, and a few fragmentary notes taken by Vice-President Adams, 'apparently for the sake of guiding his own judgment' in case of a tie vote which it might devolve upon him to decide.<sup>5</sup> Especial interest attaches to this debate and to the action

<sup>1</sup> *Annals of Congress*, I, 517. Forty-five years later, ex-President Madison argued yet more vigorously against the Senate's sharing in the power of removal, saying that it would enable the Senate 'to force on the Executive department a continuance in office even of Cabinet officers, notwithstanding a change from a personal and political harmony with the President to a state of open hostility towards him.' Quoted by Solicitor General James M. Beck, representing the United States in *Myers v. U.S.* (1926).

<sup>2</sup> Of the 22 who voted against the bill, only one had been a member of the Federal Convention. Professor L. M. Salmon, *op. cit.*, 17, n. 3.

<sup>3</sup> Madison wrote to Edward Pendleton, July 15, 1789: 'It gives me much pleasure to find your approbation given to the decision of the House of Representatives on the power of removal.... I was apprehensive that the alarms with regard to the danger of Monarchy would have diverted their attention from the impropriety of transferring an Executive trust from the most to the least responsible member of the Government.

<sup>4</sup> C. C. Thach, *The Creation of the Presidency*, 154.

<sup>5</sup> John Adams, *Writings*, III, 104.

of the Senate from two facts: first, that exactly one half of the Senators present had been members of the Federal Convention, and second, that the passing of the pending bill would result in the substantial reduction in the scope of power which Hamilton himself alleged the Constitution had assigned to the Senate.

Maclay at once opposed the whole scheme of the three bills creating new executive departments. He insisted that they were unnecessary and would lessen the President's responsibility — that if he deemed a Secretary of Foreign Affairs necessary, he had but to nominate such an officer; the Senate's approval would be tested by its vote on confirmation of the appointment, and the Representatives' approval by their vote on a bill for such an officer's salary.<sup>1</sup> But this view made little impression. The Senate at once gave its assent to the first section of the bill. Maclay seems to have been the most long-winded, but not the most persuasive of the opponents, insisting that the depriving power should be the same as the appointing power, and that impeachment was the only process of removal warranted by the Constitution. Johnson said, 'Gentlemen convince themselves that it is best the President should have the power and then study for arguments.'<sup>2</sup> Both in the Senate and in the House it was alleged that veneration for Washington was prejudicing members in favor of the President's sole power of removal, and often in later generations it has been intimated that this was the decisive factor in the decision. Maclay said:

If the virtues of the Chief Magistrate are brought forward as a reason for vesting him with extraordinary powers, no nation ever trod more dangerous ground. His virtues will depart with him, but the powers which you gave him will remain, and if not properly guarded will be abused by future Presidents if they are men.

Lee declared that he could see no responsibility in the President or the great officers of state, fortified as they were 'by a masked battery of constructive powers.' He offered a motion, 'that the officer should be responsible.' This suggestion leading toward ministerial responsibility, Maclay says, 'was lost, of course.'<sup>3</sup>

In favor of the President's sole power of removal the principal argument was made by Ellsworth. He insisted:

There is an explicit grant to the President which contains the power of removal. The executive power is granted; not the executive powers

<sup>1</sup> Maclay's account of this debate is found in *Journal*, 109–20.

<sup>2</sup> *Ibid.*, 112.      <sup>3</sup> *Ibid.*, 119.

hereinafter enumerated and explained.<sup>1</sup> . . . I buy a square acre of land. I buy the trees, waters, and everything belonging to it. The executive power belongs to the President. The removing of officers is a tree on this acre. The power of removing is, therefore, his. It is in him. It is nowhere else.<sup>2</sup>

In discussing the Constitution's assignment of executive power in the matter of treaties and appointments to the Senate, a legislative body, Paterson declared:

Exceptions are to be construed strictly. This is the invariable rule.<sup>3</sup>

As Maclay reports the gist of his argument,

There is not a word of removability in it [the assignment to the Senate of a power to confirm nominations]! His argument was that the Executive held this as a matter of course.<sup>4</sup>

Not without significance is this identity of opinion of Ellsworth and Paterson, both of whom were soon to become Justices of the Supreme Court.

When the debate came to an end, and the question was put as to the striking out of the phrase which recognized the President's unrestricted power of removal, the vote stood ten to ten. Maclay records: 'And the Vice-President with joy cried out, "It is not a vote!" without giving himself time to declare the division of the House and give his vote in order.'<sup>5</sup> Charles Francis Adams said of this action:

The result depended upon the vote of the Vice-President. It was the first time he had been summoned to such a duty. It was the only time during his eight years' service in that place that he felt the case of such importance as to justify his assigning reasons for his vote. . . . All have agreed that no single act of the First Congress has been attended with more important effects upon the working of every part of the Government.<sup>6</sup>

<sup>1</sup> John Adams, *Works*, III, 409.

<sup>2</sup> Maclay, *Journal*, 114. He quotes Ellsworth as saying, 'It is sacrilege to touch an hair of his head, and we may as well lay the President's head on the block and strike it off with a blow' as to deprive him of this privilege, and adds that Ellsworth 'had sore eyes, and had a green silk over them. On pronouncing the last of the two sentences, he paused, put his handkerchief to his face, and either shed tears or affected to do so.' *Ibid.*, 112.

<sup>3</sup> Adams, *Writings*, III, 411.

<sup>4</sup> Maclay, *Journal*, 115.

<sup>5</sup> *Ibid.*, 116.

<sup>6</sup> John Adams, *Works*, I, 450.

For discussion of this debate and the congressional construction, see:

F. J. Goodnow, *Comparative Administrative Law*, I, 64, 103; II, 98, and references, especially U.S. v. Avery, *Deady's Reports*, 204-15.

Charles C. Tansill, *The Appointing Power of the President*. Chapter II discusses in detail 'The Interpretation of Congress in 1789,' and chapter V, 'The Interpretation of the Courts.' For the Supreme Court's decision in *Myers v. U.S.*, see pp. 827-31.

Of the ten Senators who had been members of the Convention, six by their votes declared the power of removal to be vested by the Constitution in the President alone.<sup>1</sup> Summarizing the vote of all the former members of the Convention in both branches of Congress who participated in the vote, this view was sustained by twelve to six. In the words of Dr. C. C. Thach:

The power of removal was . . . derived from the general executive power of administrative control. The latter power has not been an extra-Constitutional growth. It was the conscious creation of the men who made the Constitution. The President has possessed it as a Constitutional power from the beginning of Government under the Constitution.<sup>2</sup>

### PRESIDENTS' PRACTICE IN MAKING REMOVALS

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#### REMOVALS BY THE 'STATESMEN PRESIDENTS'

The 'Statesmen Presidents,' as Professor Salmon called them, exercised the power of removal with such restraint as to cause little jealousy or resentment on the part of the Senate. Their actual removals numbered as follows: Washington, 17; John Adams, 21;

<sup>1</sup> Bassett, Ellsworth, Morris, Paterson, Read, and Strong.

<sup>2</sup> *The Creation of the Presidency*, 159.

#### VIEWS OF EARLY COMMENTATORS

Early commentators expressed their surprise at this construction:

*Story*: That the final decision of this question in favor of the executive power of removal was greatly influenced by the exalted character of the President then in office (Washington) was asserted at the time and has always been believed; yet the doctrine was opposed, as well as supported, by the highest talents and patriotism of the country. The public, however, acquiesced in the decision; and it constitutes, perhaps, the most extraordinary case in the history of the government of a power conferred by implication on the executive by the assent of a bare majority of Congress. *Commentaries*, II, secs. 1538 and 1543.

*Kent*: This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as a decisive authority in the case.... It is, however, a striking fact in the constitutional history of our government that a power so transcendent as that is, which places at the disposal of the President alone the tenure of every executive officer appointed by the President and Senate, should depend upon inference merely, and should have been gratuitously declared by the First Congress, in opposition to the high authority of the *Federalist*, and should have been supported or acquiesced in by some of those distinguished men who questioned or denied the power of Congress, even to incorporate a national bank. *Commentaries*, I, 309-10.

Jefferson, 109; Madison, 27; Monroe, 27; J. Q. Adams, 12.<sup>1</sup> No President in our history has been more painstaking to avoid all imputation of favoritism or partisanship in making nominations or removals than John Quincy Adams.<sup>2</sup> But the possibilities involved in the Four Years' Law were making themselves clear. Instead of the wholesome discrimination of the faithful from the defaulters, which was the professed object of this law, 'the expiration of the four years' term came to be considered as the termination and vacation of all the offices on which it fell, and the creation of vacancies to be filled at the option of the President.'<sup>3</sup> Such loaves and fishes must be shared with the Senate. Thus it came about that during the administration of the President who was least likely to abuse the power of appointment or removal, 'for the first time was presented a well-considered programme for encroachment.' On motion of Macon, a select committee was appointed to investigate 'the expediency of reducing Executive patronage.' Benton became its chairman, and the committee brought in a report, showing the number and value of the appointive offices, and a recommendation that the appointing power of the President should be reduced.<sup>4</sup> The committee presented six bills. For the present purpose it is essential only to note that they recommended the repeal of the Four Years' Law, but that they made no effort to reduce the amount of the patronage, but only to shift its control. Thus, postmasters whose salaries exceeded a fixed sum were to be appointed only with the advice and consent of the Senate; Army and Navy officers were to hold their commissions during good behavior, instead of 'during the pleasure of the President,' and if a vacancy had been caused by removal, the President was to be required to state to the Senate the fact of the removal at the same time that the nomination was made, with a statement of the reasons for which such officer had been removed. On Macon's motion these bills were tabled, but the Senate

<sup>1</sup> These are the figures given by C. R. Fish, American Historical Association, *Report* (1899), 84. They are for civil officers only, military and naval removals having been left out of the account.

<sup>2</sup> In his entire term he removed but 12, and failed to renominate but 8. *Memoirs*, VII, 424.

<sup>3</sup> His own opinion as to the power of removal he stated thus: 'I said that the discretionary power of the President to remove was settled by law, and by the uniform practice of 40 years. I thought it correctly settled; but if the discretion was palpably abused, I thought it impeachable misdemeanor. In questioning, however, this abuse of power, I thought it would be unsafe, and certainly unsuccessful, to advance any new plan.' *Memoirs*, VIII, 189, Feb. 15, 1830. C. R. Fish, *op. cit.*, 75.

<sup>4</sup> S. Doc. 88, 19th Cong., 1st sess., IV, 1-12.

had thus placed on record a sweeping assertion of its prerogatives, though no Jackson had as yet arisen to challenge them.<sup>1</sup>

#### JACKSON'S STRUGGLE WITH THE SENATE OVER REMOVALS

Between a President of Jackson's autocratic temperament and a Senate led by such giants as Benton and Calhoun, Clay and Webster, 'Presidential and Senatorial oppugnation' over the patronage could not long be delayed. At the very outset of his Administration some of his most important nominations were rejected. Even the nomination of so capable an officer as Amos Kendall, after various delays and postponements, was confirmed only by the casting vote of the Vice-President.<sup>2</sup> By these experiences the soldier President was much incensed. During the following summer Jackson 'accomplished his proscription.'<sup>3</sup> His removals, though fewer than is popularly supposed, were far more than had been made under all former Presidents — 252 as compared with 193. Partisan use of the power was new, and the capricious nature of some of his selections and removals provoked hostility.

In the spring of 1830, the clash came in the Senate in the debate over the executive power of removal, precipitated by the introduction of a resolution — a precedent for many that were to follow — to request the President 'to inform the Senate of the cause or causes that existed for the removal of William Clark from the office of United States Treasurer.'<sup>4</sup> Said Senator Barton:

The majority contend that the President has the power to remove Federal officers . . . and that the Senate has no right to inquire into the cause of removal; but must presume the cause to have been lawful! and cannot restrain the President in an abusive exercise of that power but must rely on impeaching him by the House of Representatives.

<sup>1</sup> See C. R. Fish, *op. cit.*, 74–75, for discussion of this report, which he calls 'the first distinctly aggressive act on the part of the Senate in the great struggle between that body and the President for the control of the patronage.' Benton, *Abridgement of Debates*, VIII, 533–40, 600.

<sup>2</sup> *Senate Executive Journal*, IV, 101.

<sup>3</sup> Fish, *op. cit.*, ch. V, 'The Establishment of the Spoils System'; Prof. L. M. Salmon, *op. cit.*, ch. V, 'President Jackson's Interpretation of the Constitution.'

<sup>4</sup> *Niles's Register*, VIII, 100. Debate on similar resolutions, *ibid.*, 165–66. Senator Bibb opposed Barton's resolution on the ground that former Executives had never been called upon to assign reasons for removing an incumbent from office. Apparently 'the only instance in the early history of the government of an attempt to question the motives of the President in regard to removal' was the resolution in 1814 asking for the reasons for Madison's dismissal of Postmaster-General Granger. It was rejected on the ground that the Senate had not the right to make such an inquiry. Salmon, *op. cit.*, 44.

The minority deny all these positions except the removing power for cause.... We contend for the restraining powers of the Senate of the United States, as understood by the contemporary expounders of the federal constitution, in matters of displacing as well as appointing federal officers in opposition to arbitrary Executive discretion, and servility to Executive will; and of rendering the Senate the venal register of Executive edicts.<sup>1</sup>

This resolution was defeated by a close vote.<sup>2</sup> A month later the struggle was reopened in a series of resolutions introduced by Holmes. His general contention was: The President of the United States, by making removals during recess, may abuse the power; he has so abused it; the Senate was intended by the Constitution to serve as the effectual tribunal to restrain and correct such abuses. The final resolution requested the President to lay before the Senate 'the number, names and offices of the officers removed by him since the last session of the Senate, with the reasons for each removal.' By a close vote further consideration of these resolutions was indefinitely postponed.<sup>3</sup>

By a vote of more than two to one, February 3, 1831, the Senate adopted a resolution declaring it 'inexpedient to appoint a citizen of any one state to an office which may be created or become vacant in any other state of the Union within which such citizen does not reside, without some evident necessity for such appointment.' The successive rejection of several nominations to offices in Mississippi led Jackson to the belief that this was being done in pursuance of the foregoing resolution. In a message to the Senate March 2, 1833, he declared:

Regarding that resolution, in effect, as an unconstitutional restraint upon the authority of the President in relation to appointments to office, I think it proper to inform the Senate that I shall feel it my duty to abstain from any further attempt to fill the offices in question.<sup>4</sup>

On that same day the offending resolution was rescinded by a vote of 17 to 9.

A year later, Senator Ewing introduced two sweeping resolutions:

That the practice of removing public officers by the President for any other purpose than that of securing a faithful execution of the laws, is

<sup>1</sup> This debate was in secret session, but the speeches of Barton and Marks were published by Gales and Seaton, to whom they had been furnished for that purpose. *Cong. Debates*, 457-70, March 17, 1830.

<sup>2</sup> Noes, 26, ayes, 22. Senate *Executive Journal*, IV, 75.

<sup>3</sup> *Cong. Debates*, April 28, 1830, 385-96.

<sup>4</sup> *Messages*, II, 636; Senate *Executive Journal*, IV, 331.

hostile to the spirit of the Constitution, was never contemplated by its framers, is an extension of executive influence, is prejudicial to the public service and dangerous to the liberties of the people;

That it is inexpedient for the Senate to advise and consent to the appointment of any person to fill a supposed vacancy in any office, occasioned by the removal of a prior incumbent, unless such prior incumbent shall appear to have been removed for a sufficient cause.<sup>1</sup>

In response to a request for a copy of the correspondence in which the President announced his purpose to nominate Andrew Stevenson as envoy extraordinary to England, in order to avoid misrepresentation Jackson sent the paper, but with the statement:

As a compliance with this resolution might be deemed an admission of the right of the Senate to call upon the President for confidential correspondence of this description, I consider it proper on this occasion to remark that I do not acknowledge such a right.

In September, 1833, Jackson summarily dismissed Duane as Secretary of the Treasury, for refusing to comply with the President's direction that in future the public deposits should be placed in leading state banks instead of in the Bank of the United States. This action aroused resentment in the Senate, not only as an 'autocratic' exercise of the power of removal, but especially as an interference with the department which, from the day of its creation, had been considered to be peculiarly under the control of Congress.<sup>2</sup> This resentment found expression in the passing of Clay's resolution, censuring Jackson's action in regard to the deposits as illegal — the resolution which three years later was dramatically 'expunged' from the Senate *Journal*<sup>3</sup> — and also, in the rejection, at Clay's instance, of the nomination of Roger B. Taney as Secretary of the Treasury.<sup>4</sup>

Clay persisted in direct attacks upon the President's power of removal, introducing a series of resolutions denying that the Constitu-

<sup>1</sup> Jan. 31, 1832.

<sup>2</sup> In the Federal Convention several members had argued that the Treasurer should not be appointed by the President, as that would 'multiply objections to the system.' (H. B. Learned, *The President's Cabinet*, 102.) Whether or not the phraseology of the act creating the Treasury Department, in its differences from that of the acts creating the Departments of Foreign Relations and of War, was intended 'to establish a direct intercourse between the members of the legislature and himself [Alexander Hamilton] for his own purposes,' as President Monroe is said to have declared (*ibid.*, 103), the practice soon became common for the Secretary of the Treasury, not only to report directly to Congress, but to do so without the knowledge or consent of the President, and sometimes to his great embarrassment. (C. C. Tansill, *op. cit.*, 15.) In this debate in 1833 Clay said: 'Congress reserved to itself the control of that department. It refused to make it an executive department. Its whole structure manifests cautious jealousy and experienced wisdom.' *Annals of Congress*, X, part I, 66.

<sup>3</sup> Page 976.

<sup>4</sup> Page 762.

tion bestowed any such power upon the Executive, and insisting that Congress by law should provide for the non-removal, unless with consent of the Senate, of all officers of the United States except those in the diplomatic service.<sup>1</sup>

But the Executive's direct declaration of independence<sup>2</sup> was called forth by the resolution, passed by the Senate by the close vote of 23 to 22, requesting the President to communicate copies 'of the charges, if any, which may have been made to him against the official conduct of Gideon Fitz,' just removed from the office of Surveyor-General of South Tennessee. This request was based upon the ground that the papers 'may contain information necessary to the action of the Senate on the nomination of his successor.'<sup>3</sup>

Jackson's patience was exhausted. His message of February 11, 1835, is the classic assertion of the President's unrestricted power of removal. Declaring that, without conceding the right of the Senate to make similar requests, he had deemed it expedient, for reasons which he had stated, to comply with several of them, he continued:

It is now, however, my solemn conviction that I ought no longer, from any motive, nor in any degree, to yield to these unconstitutional demands. Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive.... The President in cases of this nature possesses the exclusive power of removal from office; and under the sanctions of his official oath, and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require. On no principle known to our institutions can he be required to account for the manner in which he discharges this portion of his public duties, save only in the mode and under the forms prescribed by the Constitution.

A compliance with the present resolution would in all probability subject the conduct and motives of the President in the case of Mr. Fitz, to the review of the Senate when not sitting as judges in an impeachment; and even if this consequence should not occur in the present case, the compliance of the Executive might hereafter be quoted as a precedent for similar and repeated applications. Such a result, if acquiesced in, would ultimately subject the independent constitutional action of the Executive in a matter of great national concernment to the domination and control of the Senate; if not acquiesced in, it would lead to collisions

<sup>1</sup> *Annals of Congress*, X, part I, 835. This decade saw introduced again and again proposals of constitutional amendments to give to Congress the appointment and removal of the Secretary of the Treasury and other financial officers. Representative Underwood introduced at least three such resolutions. In 1841, Clay introduced a similar amendment.

<sup>2</sup> *Messages*, III, 53.

<sup>3</sup> *Ibid.*, 132-34.

between coördinate branches of the Government, well calculated to expose the parties to indignity and reproach, and to inflict on the public interest serious and lasting mischief.<sup>1</sup>

The Senate showed its resentment by promptly rejecting the nomination for the office in question, which had been pending as a recess appointment for three months.<sup>2</sup> A year later, Jackson sent in a renomination of the same man, which the Senate again rejected by a vote of nearly two to one.<sup>3</sup>

Jackson's obstinacy may have been stimulated by the knowledge that on motion of Calhoun, now his enemy, there had just been chosen by the Senate a committee of six, three from each of the political parties, 'to inquire into the extent of Executive patronage; the circumstances which have contributed to its increase of late; the expediency and practicability of reducing the same, and the means of such reduction.'<sup>4</sup> The report of this committee gave rise to a long debate in which the giants of the Senate all took part.<sup>5</sup> The bill reported by the committee was characterized by John Quincy Adams as a mutilated copy of one of the bills reported in 1826. It provided for the repeal of the first two sections of the Four Years' Law of 1820, and required that the President should submit to the Senate the reasons for each removal. Adams declared: 'The object of the bill, and of the report, and of Mr. Webster's speech, is to cut down the Executive power of the President and to grasp it for the Senate.'<sup>6</sup> Calhoun, Webster, and Clay, on this one occasion, each for reasons of his own, found themselves in accord in trying to curb the President.

Webster's attitude is summed up thus:

The law of 1820, intended to be repealed by this bill, expressly affirms the power. I consider it, therefore, a settled point; settled by construction; settled by precedent, settled by the practice of the Government, and settled by statute. At the same time, I am very willing to say that, after considering the question again and again, within the last six years, in my deliberate judgment, the original decision was wrong. I cannot

<sup>1</sup> Senate *Executive Journal*, IV, 468-69.

<sup>2</sup> *Ibid.*, 481.

<sup>3</sup> *Ibid.*, 529.

<sup>4</sup> The members, chosen by ballot, Jan. 6, 1835, were Calhoun, Southard, Bibb, Webster, Benton, and King (Ga.). *Cong. Debates*, 109.

<sup>5</sup> *Ibid.*: Calhoun (389-92, 418-21, 423-27, 432-39, 553-63); Clay (454-55, 513-23); Webster (458-70); Benton (367-89); Buchanan (495-503); Grundy (524-35). It has been noted as a strange coincidence that in this struggle 'all the adherents of Jefferson and Jackson were marshalled on the side of the "implied powers," while their opponents became "strict constitutionalists."'

<sup>6</sup> *Memoirs*, IX, 218.

but think that those who denied the power, in 1789, had the best of the argument; and yet, I will not say that I know myself so thoroughly as to affirm that this opinion may not have been produced, in some measure, by that abuse of the power which has been passing before our eyes for several years.<sup>1</sup>

Clay's comment on the construction by Congress in 1789 was as follows:

The precedent of 1789 was established in the House of Representatives against the opinion of a large and able minority, and in the Senate by the casting vote of the Vice-President, Mr. John Adams. It is impossible to read the debate which it occasioned, without being impressed by the conviction that the just confidence reposed in the Father of his Country, then at the head of the Government, had great, if not decisive influence in establishing it.<sup>2</sup>

He believed that it had not been reconsidered only because, up to Jackson's Administration, 'it was not abused, but generally applied to cases to which the power was justly applicable.' Buchanan and Grundy opposed the bill as contrary to the long-accepted construction of the Constitution and calculated to impair efficient administration. February 21, 1835, it passed the Senate by a vote of 31 to 16.

While this debate was in progress in the Senate, it was closely followed by Representative John Quincy Adams whose father, as Vice-President, by his casting vote had determined the Senate's construction of 1789, and who had himself recently studied the patronage problem from the President's chair. This doubly interested critic declared: 'The reasoning of Mr. Clay, of Mr. Calhoun, and of Mr. Webster appears to me all shallow and sophistical; but they speak to popular prejudice.... These giants were feebly resisted by the Administration members of the Senate, who understood little of the subject.' So he set himself assiduously to the task of 'doing justice to the subject in the House.' After making a careful study of the previous reports, resolutions and debates bearing on the subject, he prepared the draft of a speech which would occupy between three and four hours, and containing 'matter to grind up into dust Calhoun's and Webster's speeches, and also Calhoun's Patronage report.'<sup>3</sup>

<sup>1</sup> *Cong. Debates*, 461, Feb. 16, 1835.

<sup>2</sup> *Ibid.*, 519.

<sup>3</sup> *Memoirs*, IX, 218-26. His son, Charles Francis Adams, brought out a vigorous defense of the President's power of removal in 'An Appeal from the New to the Old Whigs.' In acknowledgment of receipt of this pamphlet, he received from Madison one of the last letters he ever wrote, dated Oct. 13, 1835, in which he adhered to his former view, saying: '... A [Senate] veto on removals from office would at all times be worse than inconvenient in its operation, and in party times might, by throwing the executive machinery out of gear, produce a calamitous interregnum.' *Letters and Other Writings*, IV, 385.

But this portentous speech never secured a hearing, for 'the bill was not taken up in the House, but was buried with many others, by the necessary close of the session.'<sup>1</sup>

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#### THE TENURE OF OFFICE ACT

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#### JOHNSON'S CONTEST WITH THE SENATE OVER REMOVALS

The greatest controversy in our history over the power of removal grew out of the antagonism between President Johnson and Congress.<sup>2</sup> It culminated in the Tenure of Office Act of 1867. In his 'swing 'round the circle,' the President made a series of speeches flouting Congress. At St. Louis, September 8, 1866, he said:

I believe that one set of men have enjoyed the emoluments of office long enough, and they should let another portion have a chance. How are these men to be got out unless your Executive can put them out? . . . If you will stand by me in trying to give the people a fair chance — to have soldiers and citizens to participate in these offices — . . . I will kick them out as fast as I can.<sup>3</sup>

As a matter of fact, the proscription was already under way, and it was evident that the most obstinate of Presidents was bent on using the patronage to build up a party of his own and to thwart the congressional reconstruction policy.

<sup>1</sup> The bitter controversy between President Tyler and a hostile Congress led to the appointment of a Senate Committee on Retrenchment, whose report, submitted by Senator Moreland, June 15, 1844, contained a summary of previous debates and resolutions upon appointments and removals, especially in 1826 and 1835, and a comprehensive showing of the extent of the patronage and the number of appointments and removals in the several departments since the beginning of the Tyler Administration. This 450-page report was presented on almost the last day of the session, and its proposals for restricting the President's powers were not acted upon.

<sup>2</sup> C. R. Fish notes, even during Lincoln's life, evidences of 'a jealousy of the overgrown power of the President' in many provisions, for example, forbidding payment to certain classes of recess appointees 'until such appointees shall have been confirmed by the Senate,' and requiring the President to submit reasons for the removal of consular clerks. A contest seemed inevitable. 'But where there would have been discussion, mutual concession, and final agreement, under Lincoln, there was war under Andrew Johnson.' (*Ibid.*, 187.) See report of actual removals during 1866, *ibid.*, 189.

<sup>3</sup> Quoted by Sumner, Jan. 18, 1867, from *National Intelligencer*. Professor Salmon, *op. cit.*, 89, n. 4.

As to officers in the military or naval service, his power had already been curbed by a statute forbidding their dismissal from service 'except upon and in pursuance of the sentence of a court martial.'<sup>1</sup> During both sessions of the Congress ending March 2, 1867, both Houses of Congress had been frequently importuned to take the power of removal from the President, but had refused. Early in 1867, Edmunds, from a joint select committee on retrenchment, reported a bill providing that all civil officers, except members of the Cabinet, appointed by and with the advice and consent of the Senate, should hold their office until a successor had been in like manner appointed and duly qualified.<sup>2</sup> It further provided that for causes deemed sufficient by him, the President might suspend an officer in recess of the Senate and designate some suitable person as a temporary successor. Within twenty days after the first day of the next meeting of the Senate, the President should report the suspension and designation. If the Senate concurred, the President might remove the officer and with the Senate's consent appoint a successor; if the Senate refused to concur, the suspended officer would forthwith resume his functions. A third clause — to get rid of the eighty-year-old controversy as to the meaning of 'happen' — authorized the President's making recess appointments when vacancies 'happen by death, resignation, expiration of terms of office, or other lawful cause,' the intent being to strip him of the power to fill a vacancy which he had created by the removal of the incumbent. If at its next session the Senate should fail to consent to an appointment to fill such office, it should remain in abeyance, without any form of emolument, until filled by appointment with Senate consent, its functions meantime being performed by the officer who would by law exercise them in case of a vacancy. A final section provided that this Act should not be construed to extend the term of any office the duration of which was already limited by law.

This bill evoked much heated debate. In language close to the limit of parliamentary tolerance, Sumner denounced the President as

a usurper, who, promising to be a Moses, has become a Pharaoh.... Whenever any vacancy occurs, it is filled by the partisans of his usurpation. Other vacancies are created to provide for these partisans. I need not add that just in proportion as we sanction such nominations or fail to arrest them, according to the measure of our power, we become partners of his usurpation.

<sup>1</sup> *Cong. Globe*, 39th Cong. 1st sess., Appendix, 338.

<sup>2</sup> Jan. 10, 1867, *Cong. Globe*, 382.

Later, urging an amendment which would make subject to confirmation by the Senate the appointment of all officers with salaries exceeding one thousand dollars, Sumner declared that if this increased the labors of the Senate, its members should not shirk the duty of the present hour —

the protection of the loyal and patriotic citizen.... You may ask, protection against whom? I answer plainly, protection against the President of the United States.... There was no such duty on our forefathers, ... because there was no President of the United States who had become the enemy of his country.<sup>1</sup>

The amendment of most significance was one to cut out of the bill its clause excepting the heads of departments. This proposal, supported by Senators who utterly rejected the theory that department heads should be confidential advisers of the President, was defeated in the Senate, but was passed in the House.<sup>2</sup> In committee of conference it was agreed that Cabinet officers should hold for the term of the President by whom they were appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.<sup>3</sup> Thus amended and passed, the bill was vetoed by President Johnson in an able message, denying the constitutionality of its restriction of the President's power of removal.<sup>4</sup> In justifying his veto, he presented a succinct review of the congressional debate in 1789, cited the approving opinion of the Supreme Court, and the concurring views of most eminent commentators, and, by reference to the necessity for prompt and numerous removals at the outbreak of the Civil War, emphasized how indispensable the President's power of removal was to his faithful and efficient execution of the laws. This veto message was received on the very last day of the session. But Congress was resolved. Immediately, without a word of debate, the Senate passed the bill over the veto by a vote of 35 to 11. On the evening of the same day, the House followed the

<sup>1</sup> *Cong. Globe*, 525. Strange words, for a Senator who was hoping soon to sit as judge in the trial of the President on impeachment charges!

<sup>2</sup> Senate, Jan. 18, 1867 (*ibid.*, 548), 13 to 27; House, Feb. 2, 1867 (*ibid.*, 720), 82 to 63.

<sup>3</sup> Buckalew, one of the Senate conferees, refused to sign the report, and in the Senate pointed out the inconsistencies and inconveniences that this would involve. Williams replied: 'I have no doubt that any Cabinet minister who has a particle of self-respect ... would decline to remain in the Cabinet, after the President had signified to him that his presence was no longer desired.' *Ibid.*, 1515.

<sup>4</sup> *Messages*, VI, 492-98, citing *Ex parte Hennen*, Jan., 1839, 13 Peters, 139.

Senate's example, overriding the veto by a vote of 133 to 37, and the bill became a law.<sup>1</sup>

The President's next annual message in vigorous language protested that this law had 'almost destroyed official accountability' in financial administration.

The President may be thoroughly convinced that an officer is incapable, dishonest, or unfaithful to the Constitution, but under the law which I have named the utmost he can do is to complain to the Senate and ask the privilege of supplying his place with a better man... Under such a rule the President cannot perform the great duty assigned him of seeing the laws faithfully executed, and... it disables him most especially from enforcing that rigid accountability which is necessary to the due execution of the revenue laws.<sup>2</sup>

Ten days later he sent a message to the Senate, announcing that on August 12 he had suspended Edwin M. Stanton from the office of Secretary of War, following his defiant refusal to resign 'before the next meeting of Congress,' which was a virtual denial of the power of the President to suspend or remove him during recess of the Senate. In this message the President declared that before vetoing the Tenure of Office Bill he had submitted it to the consideration of the Cabinet:

Every member of my Cabinet advised me that the proposed law was unconstitutional. All spoke, without doubt or reservation, but Mr. Stanton's condemnation of the law was the most elaborate and emphatic,... and advised that it was my duty to defend the power of the President from usurpation and to veto the law.<sup>3</sup>

<sup>1</sup> March 2, 1867. Later an attempt was made to extend still further the Senate's control, by a bill to vacate at the end of thirty days the tenure of a great number of general and special agents, who had been appointed by the President or heads of departments, and to make appointment to such positions thereafter subject to the advice and consent of the Senate. Passed by the Senate, Feb. 7, 1868, by a vote of 32 to 9, this bill was not brought to a vote in the House.

The Constitution of the Confederate States of America made provision for the removal of officers as follows: 'The principal officers in each of the executive departments, and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the executive departments may be removed at any time by the President, or other appointing power, when their services are unnecessary, or for dishonesty, incapacity, inefficiency, misconduct or neglect of duty; and when so removed, the removal shall be reported to the Senate, together with the reasons therefor.' (Art. II, sec. 3.)

<sup>2</sup> *Messages*, VI, 569.

<sup>3</sup> *Ibid.*, 583-94. The entire correspondence with Stanton is set forth therein. A striking precedent was later discovered. May 13, 1800, President John Adams summarily removed Timothy Pickering, Secretary of State, after he had declined to comply with a request for his resignation. And in this case the removal was not submitted to the Senate, although that body was then in session. W. A. Dunning, *Essays on Reconstruction*, 286.

Solely on the ground of ill health, Stanton had declined the President's request to write the veto message upon the Tenure of Office Bill, but had offered to aid in its preparation. The President also stated that in the meeting of the Cabinet the point was distinctly made by one of its members that the tenure of the members appointed by Mr. Lincoln was not fixed by the provisions of the Act, and that no dissent was expressed.<sup>1</sup>

On recommendation of its Committee on the Judiciary, by a vote of 35 to 6, the Senate refused to concur in the suspension.<sup>2</sup> A few weeks later the President sent a message to the Senate announcing that he had removed Stanton and had designated the Adjutant-General of the Army to act as Secretary of War *ad interim*.<sup>3</sup> To this the Senate made immediate reply by passing a resolution:

That under the Constitution and Laws of the United States, the President has no power to remove the Secretary of War and designate any other officer to perform the duties of that office *ad interim*.<sup>4</sup>

Eager to catch popular favor at each stage in this controversy, the Senate immediately removed the seal of secrecy from these proceedings. The following day the President sent to the Senate a long message, clearly setting forth the grounds on which he believed his action justified, emphasizing the unanimous assertion of his Cabinet that the law was unconstitutional, the reasons for holding that in any case that law gave no tenure to Mr. Stanton, since he had been appointed, not by Mr. Johnson, but by his predecessor. He declared that his orders of suspension and of removal had both been intended to place the case in such a position as would make both necessary and proper a resort to the Supreme Court of the United States in order that all doubts might be removed and the true construction of the act be fixed by its decision.<sup>5</sup> He ended his message thus:

Actuated by public considerations of the highest character, I earnestly protest against the resolution of the Senate which charges me in what I have done with a violation of the Constitution and laws of the United States.

<sup>1</sup> Gideon Welles sustains the President's statement. As to Stanton's attitude he declares the President's veto message of the Tenure of Office Bill 'was much milder than his [Stanton's] declarations of the unconstitutionality as well as impolicy of that bill.' *Diary*, III, p. 163, 290.

<sup>2</sup> *Senate Executive Journal*, XVI, 128-30.

<sup>3</sup> *Messages*, VI, 621.

<sup>4</sup> *Ibid.*, 622-27.

<sup>5</sup> In his message, Johnson speaks of his plan having been 'frustrated,' doubtless referring to Grant's refusal, after examining the law, to stand up to his provisional agreement. See Gideon Welles, *Diary*, III, 259-61.

In the impeachment of President Johnson which immediately followed,<sup>1</sup> the principal charge was in effect that he had tried to defeat the execution of the Tenure of Office Act, by his unwarranted removal of Stanton and the appointment of Thomas. The President's counsel developed the lines of defense which the President had stressed in his two messages to the Senate. The House managers assailed the legislative construction of the power of removal given in 1789, insisted that it was competent to Congress to correct that mistake in 1867, and laid great stress upon the insistence that it was not within the power of the President to set aside an Act which had become the law of the land by being passed over his veto. With thin disguising of his appeal to the Senate's *esprit de corps*, Manager Bingham tried to 'make the verdict depend on the bare question whether the President could interpret judicially the Acts of Congress.'<sup>2</sup> The highly dubious question whether any protection was given to Stanton as a Lincoln appointee made several Senators hesitant to hold the President guilty of a willful violation of the Constitution and the law. In the final vote on the principal article of impeachment, seven Republicans with twelve Democrats voted for acquittal against thirty-five Republicans who pronounced the President guilty. Says Professor Dunning: 'The single vote by which Andrew Johnson escaped conviction marks the narrow margin by which the Presidential element in our system escaped destruction.'<sup>3</sup> Upon announcement of the verdict Stanton at once relinquished charge of the War Department. President Johnson thereupon sent to the Senate the nomination of General Schofield as Secretary of War, 'in place of Edwin M. Stanton, removed.'<sup>4</sup> To 'save its face,' the Senate prefaced confirmation of this nomination by a preamble declaring that Stanton had not been legally removed, but had relinquished his post 'for causes stated in his note to the President.'<sup>5</sup>

#### PARTIAL REPEAL IN GRANT'S ADMINISTRATION

Till the end of Johnson's term the inevitable friction continued. Contests over nominations were many, yet the Senate found itself forced, if it would have any share in the appointments, to consent, even to some which were expressly stated to be for offices the holders

<sup>1</sup> Feb. 25 to May 25, 1868.

<sup>2</sup> Page 59. Note Tucker's comment on the results which would come from 'construing' the Constitution as vesting the power of removal in the President.

<sup>3</sup> W. A. Dunning, *Essays on Reconstruction*, 291, n.

<sup>4</sup> *Ibid.*, 303.

<sup>5</sup> Senate *Executive Journal*, XVI, 236 and 239.

of which had been 'removed' or were to be 'removed.'<sup>1</sup> The intent and the effect of the Tenure of Office Act was to substitute the discretion of the Senate for that of the President in making removals from office. But how insecure was the claim that in passing that Act Congress was calmly legislating for the future is shown by the speed with which it set about undoing its own work. While Johnson was still President, a bill for the repeal of the Act passed the House.<sup>2</sup> In the Senate, though reported back from committee, it was not brought to a vote. But on the day when the hated Johnson gave place to General Grant, Congress was convened in special session, and the first bill introduced in the Senate and the third in the House proposed the repeal of that act, of which Senator Thayer said:

I shall now vote to repeal this law.... I will not now vote to put upon an honest man the manacles which I helped to forge for a dishonest man.... We have this law upon the statute book which we passed to prevent Andrew Johnson from removing Republicans from office. That was the purpose. I strip it of all guise, of all arguments, of all Constitutional questions. The object was to prevent the unjust removal of those men who would not follow Andrew Johnson in his tortuous course of treachery to those who have elevated him to power.<sup>3</sup>

Five weeks from Grant's inauguration had not passed when the sections of the act regulating suspensions from office during the recess of the Senate were entirely repealed. In their place were submitted provisions which, instead of limiting the causes of suspension to misconduct, crime, disability, or disqualification, expressly permitted suspension by the President 'in his discretion,' and completely abandoned the requirement obliging him to report to the Senate the evidence and the reason for his action.<sup>4</sup> The new law provided that during a session of the Senate the President could not remove any civil officer in whose appointment the Senate had shared without at the same time submitting the nomination of a successor. As to sus-

<sup>1</sup> C. R. Fish (*op. cit.*, 200, n. 3) cites the case of the postmastership of Newburgh, N. J. Four different candidates were nominated and rejected; the former holder of the office was renominated and rejected three successive times. H. J. Ford (*The Rise and Growth of American Politics*, 266) quotes Senator Hoar (April 6, 1893, *Cong. Rec.*, 137): 'When I came into public life in 1869, the Senate claimed almost the entire control of the executive function of appointment to office.... What was called "the courtesy of the Senate" was depended upon to enable a Senator to dictate to the Executive all appointments and removals in his territory.' He added: 'That doctrine has disappeared as completely as the locusts that infested Egypt in the time of the Pharaohs.'

<sup>2</sup> Jan. 11, 1869, *Cong. Rec.*, 283.

<sup>3</sup> March 20, 1869, *ibid.*, 181.

<sup>4</sup> See comment on these steps toward entire repeal of the Tenure of Office Act by President Cleveland, March 1, 1886. *Messages*, VIII, 375-80.

pensions of civil officers during the recess of the Senate the new law was far more liberal than the Act of 1867, which had provided that, if the Senate refused to concur in the suspension, then the suspended officer should resume his official duties. Under the new law, in case the Senate refused concurrence in the suspension of a particular civil officer, the President was to nominate another officer in his place.<sup>1</sup>

Although the Tenure of Office Act's 'most hateful restraints' had thus been removed in order to give greater freedom of action to the popular new President, in his first message Grant urged the repeal of the Acts of 1867 and 1869, strongly emphasizing their hurtful tendency.

It could have not been the intent of the framers of the Constitution, when providing that the appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there by Federal appointment against the will of the President. The law is inconsistent with a faithful and efficient administration of the Government. What faith can an Executive put in officials forced upon him, and those, too, whom he has suspended for reason? How will such officials be likely to serve an Administration which they know does not trust them?<sup>2</sup>

In response to this message the House promptly voted for the repeal, by a majority of more than six to one, but the Senate never acted upon it. Again in 1872 the House passed a similar bill, without division, but the Senate, still clinging to the power won in the struggle with Johnson, did not bring it to a vote.

#### CLEVELAND'S DECLARATION OF INDEPENDENCE; REPEAL OF THE LAW

The preface to the next movement for repeal was the struggle between President Cleveland and the Republican Senate in the early months of his first Administration.<sup>3</sup> During the summer of 1885, he

<sup>1</sup> Act of April 5, 1869, *U.S. Statutes at Large*, XVI, 6-7. As to 'suspensions,' the Attorney-General held that if the Senate adjourned before confirming a nomination in cases of suspension, the suspended officer became reinstated, but could again be suspended. (*Opinions of Attorneys-General*, XV, 376.) Dr. C. C. Tansill, Library of Congress Legislative Reference Service, April 10, 1920.

<sup>2</sup> *Messages*, VII, 38.

<sup>3</sup> The occasion for this controversy finds a close analogy in an incident in Tyler's Administration, when the Secretary of War, in response to the request of a House select committee, which had been appointed to inquire into the causes and circumstances of the dismissal of Henry H. Sylvester, replied that 'he did not desire to make any communication to the committee, or to have any witnesses summoned by it, or to attend its meetings,' and declined to transmit any confidential papers in regard to the case. H. Rept. 945, 27th Cong., 2d sess.

suspended the United States District Attorney of an Alabama district and designated another to perform the duties of that office. In December, he sent to the Senate the nomination of this man, 'vice George M. Duskin, suspended.' The Committee on the Judiciary, to whom this nomination was referred, addressed a note to the Attorney-General, requesting that all papers and information touching the conduct of the persons proposed to be removed and to be appointed be sent to the committee for its information. After some delay, a Senate resolution was passed *directing* the Attorney-General to transmit to the Senate the papers in question. To this he replied: 'The President of the United States directs me to say that . . . it is not considered that the public interest will be promoted by compliance with said resolution.'<sup>1</sup> The committee, in an elaborate report to the Senate setting forth the correspondence and the practice in dealing with similar requests in the past, said: 'The letter assumes . . . that the Attorney-General of the United States is the servant of the President and is to give or withhold documents in his office according to the will of the Executive and not otherwise.'<sup>2</sup> It submitted a series of resolutions, the most significant of which were as follows:

That the Senate hereby expresses its condemnation of the refusal of the Attorney General, under whatever influence, to send to the Senate copies of the papers called for, . . . as in violation of his official duty and subversive of the fundamental principles of the Government, and of a good administration thereof.<sup>3</sup>

That it is, under these circumstances, the duty of the Senate to refuse

<sup>1</sup> Jan. 28, 1886, *Messages*, VIII, 376. Before this there had already come a considerable change of sentiment. In April, 1884, when President Arthur requested consent to the removal of a certain officer, Senator Hoar proposed a resolution 'That in the judgment of the Senate it is within the constitutional power of the President to remove the officer named in his message if, in his judgment, the public interests require.' Although in place of this the Senate passed the milder Edmunds resolution that 'in view of the foregoing message the Senate advise and consent to the removal,' Senator Hoar got added to it the clause, 'and that the Senate does not hereby express an opinion as to the constitutional relations of the President and the Senate in the matter of removal from office.' Fish, *op. cit.*, 206; Senate *Executive Journal*, XXIV, 249, 254.

<sup>2</sup> Feb. 18, 1886, *Cong. Rec.*, 1584-91.

<sup>3</sup> By a strange coincidence this senatorial condemnation was pronounced upon a man (A. H. Garland) who had resigned from the Senate in order to accept this Cabinet position. This majority report was signed by Edmunds, McMillan, Hoar, Wilson, and Evarts. A minority report was submitted by Pugh, Coke, Vest, and Jackson. Both are included in S. Rept. 135, 49th Cong., 1st sess. President Cleveland later commented: 'The controversy . . . arose from the professed anxiety of the majority of the Senators to guard the interests of Dustin, suspended in July, 1885. Dustin's term expired by limitation, Dec. 20, 1885, before the demand for papers and documents as to his conduct was made.' *The Independence of the Executive* (1900), 72.

its advice and consent to proposed removals of officers, the documents and papers in regard to the proposed official or personal misconduct of whom are withheld by the Executive or any head of a Department when deemed necessary by the Senate and called for in considering the matter.

These provocative resolutions led to long and heated debate in which the whole history of the power of removal passed under review. While the resolutions were pending, the President sent to the Senate a special message vigorously asserting the Executive's unrestricted power of removal. Discussing the construing of the Constitution as to this power and the enactment and modification of the Tenure of Office Act, he boldly declared his independence in these words:

The requests and demands which by the score have for nearly three months been presented to the different Departments of the Government, whatever their form, have but one complexion. They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands.

The pledges I have made were made to the people, and to them I am responsible. I am not responsible to the Senate, and I am unwilling to submit my actions and official conduct to them for judgment. . . . Neither the discontent of party friends nor the allurements constantly offered of confirmations of appointees conditioned upon the avowal that suspensions have been made on party grounds alone, nor the threat proposed in the resolutions now before the Senate that no confirmations will be made unless the demands of that body be complied with, are sufficient to discourage or deter me from following in the way which I am convinced leads to better government for the people.<sup>1</sup>

Despite this blast from the White House, the Senate majority succeeded in passing its resolutions, though by a single vote. But

<sup>1</sup> *Messages*, VIII, 381-83. This controversy occupied the Senate's time for over two weeks. More than twenty-five Senators participated in it, with varying degrees of relevancy. Its temper may be judged by the comment of the Chairman of the Committee on the Judiciary (Edmunds). In moving that this message of the President be referred to his committee, he characterized it as an extraordinary message, reminding him of the communications of King Charles I to Parliament. 'I think I am safe in saying that it is the first time in the history of the Republic of the United States that a President of the United States has undertaken to interfere with the deliberations of either House of Congress on questions pending before them, otherwise than by messages on the state of the Union, which the Constitution commands him to make from time to time.'

this was an ineffectual effort to 'say the last word.' The people's sympathy was with the President. They believed that partisanship was delaying the confirmation of nominations, already held up for many months, and that the contest was doing great harm. Heedful of this rising disapproval, within a month after passing these denunciatory resolutions the Senate began quietly, without record votes, to confirm by the score the appointments which had been in controversy. At the beginning of the next session of Congress, Senator Hoar, a signer of the above report, took the first opportunity to introduce a bill repealing 'what is left of what is called the Tenure of Office Act, passed under the administration of Andrew Johnson and as a part of the contest with that President.'<sup>1</sup> It passed the Senate in four days, and within three months had become a law.<sup>2</sup>

Many years later, referring to this Act, ex-President Cleveland said:

Thus was an unpleasant controversy happily followed by an expurgation of the last pretense of statutory sanction to an encroachment upon Constitutional Executive prerogatives, and thus was a time honored interpretation of the Constitution restored to us. The President, freed from the Senate's claim of tutelage, became again the independent agent of the people, representing a co-ordinate branch of their Government, charged with responsibilities which, under his oath, he ought not to avoid or to divide with others, and invested with powers, not to be surrendered but to be used, under the guidance of patriotic intention and an unclouded conscience.<sup>3</sup>

#### MAY CONGRESS LIMIT OR WITHHOLD THE PRESIDENT'S POWER OF REMOVAL?

A full generation passed before public interest was again keenly aroused as to the relations between the President and the Senate in the matter of removals. After years of agitation for a more sensible financial system, Congress passed a Budget Bill. With its general principles President Wilson was in hearty accord. Nevertheless, he vetoed this measure, May 27, 1920, solely because of its provision that the Comptroller-General and Assistant Comptroller-General,

<sup>1</sup> Dec. 13, 1886, *Cong. Rec.*, 113.

<sup>2</sup> Years later, Senator Hoar declared: 'In my opinion I was [then] rendering a great service to the Republican Party in getting rid of the controversy in which the people sympathized generally with the Democrats.... I do not think a man can be found in the Senate now who would wish to go back to the law which was passed to put fetters on the limbs of Andrew Johnson.... The opposition to the statute of 1887 was but the dying embers of the old fires of the Johnson controversy.' *Autobiography*, II, 144.

<sup>3</sup> Grover Cleveland, *The Independence of the Executive* (1900), 81-82.

who were to be appointed by the President with the advice and consent of the Senate, were to be removable, not by the President, but by 'concurrent resolution of Congress.'<sup>1</sup> Of course, this action aroused popular protest, and the press and the man in the street were loud in denunciation of what they called the holdup of much-needed legislation 'on a mere technicality,' by a President disposed to stretch to the limit the powers of the Executive. To the President, however, the issue seemed of far greater moment. In his veto message he said:

It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove.

I am convinced that the Congress is without constitutional power to limit the appointing power and its incident power of removal derived from the Constitution.<sup>2</sup>

<sup>1</sup> It is to be noted that — as contrasted with a *joint* resolution — a *concurrent* resolution, unless it contains 'matter which is properly to be regarded as legislative in its character and effect,' need not be presented for the President's approval. Such is Senate practice, although the report which drew this discrimination most clearly was not acted upon by the Senate, and hence has no authority of law. S. Rept. 1335, 54th Cong.

Nearly sixty years earlier, a similar limitation upon the President's power of removal imposed by an Act of Congress passed unchallenged. Jan. 26, 1863, Senator Sherman introduced a bill to provide for a national currency. Under its provisions the Comptroller of the Currency, appointed by the President, by and with the advice and consent of the Senate, was to hold office 'for the term of five years, unless sooner removed by the President, by and with the advice and consent of the Senate.' This became a law, Feb. 25, 1863. For a little over a year this statute required that as to this one office the President's power of removal should be subject to the Senate's consent. When a more comprehensive measure came from the House in 1864, it contained this identical provision. The Committee on Finance, to which it was referred, proposed to cut out the phrase 'by and with the advice and consent of the Senate,' on the ground, as Fessenden said, that that provision would be changing the rule that then existed as to all other offices, and that, in recess of the Senate, the President should have power to remove a bad officer immediately. On Buckalew's motion there was inserted a new phrase so that it should read, 'unless sooner removed by the President upon reasons to be communicated by him to the Senate,' although Fessenden insisted: 'Nothing will be accomplished by that amendment.... The man, when removed, is out of office, and whether the reasons are good, bad, or indifferent, does not change the fact.' The requirement of the Senate's consent to the removal of this officer was stricken out, but the change seems to have aroused no further interest. Act approved June 3, 1864. *Statutes at Large*, XIII.

<sup>2</sup> Message of May 27, 1920. *A propos* of this veto message an earlier Wilson dictum is of special interest. 'The Representatives of the people are the proper ultimate authority in all matters of government, and administration is merely the clerical part of government.... The difficulty, if there be any, must be in the choice of means whereby to energize the principle. The natural means would seem to be the right on the part of the representative body to have all the executive servants of its will under its close and constant supervision, and to hold them to a strict accountability; in other words, to have the privilege of dismissing them whenever their service became unsatisfactory.' *Congressional Government* (15th ed.), 266, 273-74.

This message gave rise to debate in both Houses. Said Representative Greene:

The Congress creates an office that has certain limitations upon it as to removal. That is the only office the President must fill, and he must fill it subject to those limitations.<sup>1</sup>

The attempt to pass the measure over the veto failed to secure a two-thirds majority in the House, and when it sent a new bill to the Senate, so amended as to eliminate the obnoxious phrase, this was not allowed to come to a vote. But the new Budget Act, approved by President Harding, June 10, 1921, provides that the Comptroller-General or the Assistant Comptroller-General may be removed at any time,

by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the Comptroller-General or Assistant Comptroller-General has become permanently incapacitated, or has been inefficient, or guilty of neglect of duty or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment.

It is to be noted that, under this Act of 1921, Congress may effect the removal of these officers, not by a concurrent resolution as under the Act which President Wilson vetoed, but by *joint* resolution, which becomes effective only when signed by the President or by two-thirds vote passed over his veto. So the President is here 'joined in the business.'

<sup>1</sup> *Cong. Rec.*, 66th Cong., 2d sess., 8611. The House Select Committee on the Budget brought in an amendment vesting the appointment of the Comptroller-General in the Supreme Court, thus evidencing an intent that he be classed as an 'inferior officer' under the Constitution. (*Cong. Rec.*, 66th Cong., 2d sess.) See 'The President's Veto of the Budget Bill,' by T. R. Powell, *National Municipal Review*, Sept., 1920. He held that the Constitution permits Congress to restrict the President's power of removal in the case of officers — like the proposed Comptroller-General — whose appointment is not vested in the President by the Constitution, but is voluntarily assigned to him by Congress. But he acknowledged that in the decisions which he cited the Supreme Court 'worked hard to interpret the statutes so as to avoid passing upon the constitutional question.'

Dr. C. C. Tansill, formerly of the Legislative Reference Service of the Library of Congress, who worked with the sponsors of the Budget Bill of 1920 in framing that measure, discusses the veto in *The Appointing Power* (Ms.), 95 to 105. He concludes: 'The power of removal is derivative only. The source of the grant is in Congress. In Congress alone is then the inherent constitutional right to create the office, to authorize the appointment, to condition the appointment, and to provide the manner of removal. Assuming that the Comptroller-General and the Assistant Comptroller-General are "inferior" officers of the United States, as no doubt Congress assumed, and as the President assumed in his veto message, the President's contention that Congress could not limit his incidental right of removal of these officers is not well taken.' Dr. Tansill discusses the bearing upon this question of the following Supreme Court decisions: *Ex parte Hennen*, 13 Peters, 230, 259; *U.S. v. Perkins*, 116 U.S. 483; *U.S. v. Germaine*, 99 U.S. 109-510; *Parsons v. U.S.*, 167 U.S. 324; *Reagan v. U.S.*, 182 U.S. 419; *Blake v. U.S.*, 103 U.S. 227.

## SENATE PRESSURE TO FORCE REMOVALS

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Since the opening of the nineteenth century hardly a decade has passed which has not seen a struggle on the part of the Senate to assert control over removals. In most of these clashes the Senate has been striving to prevent the President's making removals to further his own interests or to strengthen his party. But at times Senators have taken the initiative and have tried to force the President to remove officers who had incurred their distrust or ill-will.

Sometimes this action has been unofficial, representing rather the will of the party organization than that of the Senate. Thus, Madison and Monroe, as delegates of a caucus of Senate and House members, waited upon Washington, to urge the recall of Gouverneur Morris and the sending of Burr as Minister to France in his place.<sup>1</sup> Of far greater moment was the attempt in 1862 to force a reorganization of the Cabinet, and especially to oust Seward from the position of Secretary of State. In December a caucus of Republican Senators, after long debate, passed a resolution that the welfare of the country required Seward's dismissal, and, upon Sumner's motion, a committee of nine Senators was appointed to 'wait upon the President and represent to him the necessity for a change in men and measures.'<sup>2</sup> The committee's personnel spelled trouble.<sup>3</sup> Calling at the White House a few hours before the committee by appointment were to wait upon the President, Senator Browning of Illinois found him awaiting their coming in profound depression. Said he: 'They wish to get rid of me, and I am sometimes half disposed to gratify them.... Since I

<sup>1</sup> Page 725.

<sup>2</sup> For accounts of this episode, see James Ford Rhodes, *History of the United States, 1850 to 1877*, IV, 204-08; Nicolay and Hay, *Abraham Lincoln*, VI, ch. XII; Frederic Bancroft, *Life of William H. Seward*, 366-69. More recently, welcome details have been supplied by publication of the diaries of Gideon Welles and Senator Orville H. Browning. Upon this last source is largely based the account given in William E. Barton's *Life of Abraham Lincoln*, II, 153-61. Upon hearing of the caucus action, Seward at once sent his resignation to the President.

<sup>3</sup> Wade, Sumner, Trumbull, Grimes, Pomeroy, Collamer, Fessenden, Howard, and Harris (New York).

heard last night of the proceedings of the caucus, I have been more distressed than by any event of my life.'<sup>1</sup>

To the President at this first conference the committee made clear the grounds of their objections to Seward. Till nearly midnight they continued in 'a pretty free and animated conversation,' at the end of which he asked them to meet him again the following evening. At a special meeting of the Cabinet, Friday morning, December 19, the President discussed the whole situation with his advisers, and then requested that they 'should, with him, meet the committee.' Though Chase and Bates at first demurred, finally all acquiesced.<sup>2</sup> That critical meeting was attended by all members of the Cabinet except Seward (whose resignation was then in the hands of the President), and by all of the committee except Wade. The President opened the discussion by reading the resolutions and telling the substance of his previous interview with the committee. Its chairman, Collamer, calmly and fairly presented their views. Fessenden 'was pretty skillful, but a little tart.'<sup>3</sup> 'He prefaced his charges of lack of general consultations and undue influence from a single department, with saying that the Senate, "as Constitutional advisers of the President," had deemed the emergency serious enough to offer their friendly counsel.'<sup>4</sup> Chase, from whom it was believed had come to Senators' ears most of the rumors of Cabinet dissension and of Seward's too-great ascendancy, astonished the committee by fully endorsing the President's statement as to the Cabinet's unity, though regretting that there was not a more thorough consideration of important measures in open Cabinet.<sup>5</sup> After most of those present had taken part in the discussion, and the President had again spoken with 'great tact, shrewdness, and ability,' he said that it would be a gratification to him if each member of the committee would state whether he now thought it advisable to dismiss Mr. Seward, and

<sup>1</sup> Browning told the President that the action of the caucus was 'the gentlest thing that could be done. We had to do that or worse.' *Diary of Orville H. Browning*, I, 600-01.

<sup>2</sup> J. F. Rhodes (*History*, IV, 205) is obviously in error in saying that at this conference 'the two parties came together with equal surprise.' Welles's *Diary*, quoted above, makes clear that the President's request to the members of the Cabinet was explicit, and that the desirability of such a coming together was frankly discussed. W. E. Barton (*Abraham Lincoln*, II, 157) says that at the end of the first meeting with the Senators the President invited them to come again and meet in person the members of the Cabinet, and 'tell them frankly what they were saying to him.'

<sup>3</sup> Welles, *Diary*, I, 197.

<sup>4</sup> Mary L. Hinsdale, *The President and his Cabinet*, 181-82.

<sup>5</sup> Welles, *Diary*, 196.

whether his exclusion would strengthen or weaken the Administration, and the Union cause, in their respective states. In effect, four said 'Yes,' one said 'No,' and three declined to commit themselves. It was nearly midnight when the conference broke up.

Early the next morning, Secretary Welles waited upon the President, to urge him not to accept Seward's resignation. If there were objections, real or imaginary against him, Welles said,

the time, manner, and circumstances — the occasion and the methods of presenting what the Senators considered objections — were all inappropriate and wrong; that no party or faction should be permitted to dictate to the President in regard to his Cabinet; that it would be of evil example and fraught with incalculable injury to the Government and country; that neither the legislative department, nor the Senate branch of it, should be allowed to encroach on the executive prerogatives and rights. . . . He declared that Seward's errors and infirmities were venial, and were matters that did not call for senatorial interference. In short, I considered it for the true interest of the country, now as in the future, that this scheme should be defeated. The President was much gratified. He said the whole thing had struck him as it had me, and if carried out as the Senators prescribed, the whole government would cave in. It could not stand. Could not hold water — the bottom would be out.<sup>1</sup>

At the President's earnest request, Welles at once called upon Seward to persuade him not to press his resignation. Returning to the White House, he found Chase in the President's office, awaiting an interview to which he had been summoned. Chase said that he had prepared his resignation, and started to make some explanations, but the President eagerly extended his hand for the letter which Chase 'apparently hesitated to surrender.' "This," said he, looking at me with a triumphal laugh, "cuts the Gordian knot. I can dispose of this subject now without difficulty. I see my way clear."'<sup>2</sup>

A few hours later, he sent to the two Secretaries identical letters, assuring them that, after most anxious consideration, it was his deliberate judgment that the public interest did not admit of the acceptance of their resignations, and requesting that they each resume their official duties.

<sup>1</sup> Welles, *Diary*, 199-200.

<sup>2</sup> Believing, as he afterwards expressed it, "If I had yielded to that storm and dismissed Seward, the thing would all have slumped over one way, and we should have been left with a scanty handful of supporters," he saw that the resignation of Chase enabled him to win the game, and said to Senator Harris, "Now I can ride; I have got a pumpkin in each end of my bag." Rhodes, *History*, IV, 206; W. E. Barton, *Abraham Lincoln*, II, 161.

Thursday evening, with profound depression he had faced one of the severest crises that ever menaced the Administration — in the height of a civil war which threatened the existence of the Republic, 'a well-considered attempt of the whole Government party in the Senate to act as a superior council, in dictating the procedure as well as the personnel of the Cabinet.'<sup>1</sup> Monday night, to a friend who told him that the game of the President's opponents in the Senate had been 'to drive all the Cabinet out — then force upon him the recall of Mr. Chase as Premier, and form a Cabinet of ultra men around him,' he said, with a good deal of emphasis: "I am master, and they shall not do that."<sup>2</sup>

By his bold and original expedient of confronting the Senators with the Cabinet, and having them discuss their mutual misunderstandings under his own eye, he cleared up many misconceptions.<sup>3</sup> By placing Mr. Chase in such an attitude that his resignation became necessary to his own sense of dignity, he made himself absolute master of the situation; by treating the resignation and the return to the Cabinet of both ministers as one and the same transaction, he saved for the nation the invaluable services of both, and preserved his own position of entire impartiality between the two wings of the Union Party.<sup>4</sup>

In contrast with these earlier attempts by groups of Senators, as caucus delegates, to bring pressure to bear upon the President to remove some officer as a service to the party and ostensibly to the country, recent years have seen several demands, by formal resolution of the Senate, that the President remove an officer from the public service.<sup>5</sup> In 1910, a joint committee of Congress began an investigation of the conduct of the Interior Department, and especially of certain charges against its head, Secretary Richard A. Ballinger.<sup>6</sup>

<sup>1</sup> Mary L. Hinsdale, *op. cit.*, 182.

<sup>2</sup> O. H. Browning, *Diary*, I, 604.

<sup>3</sup> When the committee of nine reported to the Republican senatorial caucus, there was much surprise over Chase's words and action. When Browning asked Collamer, 'how Mr. Chase could venture to make such a statement [affirming Cabinet harmony] in the presence of the Senators to whom he had said that Seward exercised a backstairs and malign influence upon the President and thwarted all the measures of the Cabinet?' Collamer's explanation was terse: 'He lied!' (O. H. Browning, *Diary*, 603.) Obviously it would be wise for the Senate combination to await more reliable information before attempting further dictation to the President in regard to his official family.

<sup>4</sup> Nicolay and Hay, *Abraham Lincoln*, VI, 270.

<sup>5</sup> An early precedent for such action is found in the resolution passed by a vote of 68 to 38 in the House of Representatives, March 27, 1867: 'That it is the sense of this House that Henry A. Smythe should be removed from the office of Collector of the Port of New York.' Hinds, *House Precedents*, sec. 1581.

<sup>6</sup> These charges had been presented to the President, but 'he [Taft] permitted and requested Congress to investigate Mr. Ballinger.' (Theodore Roosevelt, *Autobiography*, 395–96.) Purcell made a long speech, reviewing the charges, but at his own request

At the end of a year of wrangling the committee failed to agree as to its findings and conclusions. The Democrats and one Republican declared that the charges were well-founded and that Ballinger should be removed. The other Republican — and a majority of the committee — declared the charges ill-founded. January 16, 1911, Purcell introduced a resolution declaring that the evidence showed that Ballinger was 'not deserving of public confidence and that he should not longer be retained' in the office of Secretary of the Interior. No action was taken upon this resolution. During the many months of inquisition, President Taft upheld Ballinger and declined to accept his tendered resignation. After the Secretary had been exonerated to the extent of the investigating committee's failure to agree, and after Congress had adjourned, President Taft accepted his resignation on the ground of ill-health.<sup>1</sup>

In the spring of 1924 the investigation of the naval oil leases led to an orgy of reckless denunciation which culminated in an attempt, not merely to secure the cancellation of the leases, but to force the removal of the high officials who in any way had had a part in the suspicious transactions. As early as January 27, La Follette had prepared a resolution calling on the President to demand the resignations of the Secretary of the Navy and the Attorney-General. The next day Walsh (Montana) closed a speech in the Senate with the declaration: 'Unless the resignation of the Secretary of the Navy is in the hands of the President of the United States before the sun goes down on this good day, I shall ask action by this body appropriate to the occasion.'<sup>2</sup> But the action was not quite so precipitate. January 30, after the Senate by unanimous vote had adopted the resolution for the annulment of the oil leases,<sup>3</sup> the drive against Secretary

his resolution was laid on the table. (*Cong. Rec.*, 985-95.) Believing Ballinger to be in the right in this matter, President Taft dismissed for insubordination the Interior Department investigator, Louis R. Glavis, who had 'gone over the head' of the Secretary to lay these charges before the President. August 12, 1933, by executive order President Roosevelt restored Glavis to his former civil service status, making him Chief of the Investigating Division in the Department of the Interior.

<sup>1</sup> In his letter, President Taft declared that Ballinger had been 'the object of one of the most unscrupulous conspiracies for the defamation of character that history can show.' Why Congress took no action, after the investigation had been completed, remained a mystery. A dozen years later, David S. Barry, Sergeant-at-Arms of the Senate, declared: 'The facts appear to be on his side, but the public did not so understand them. He was sacrificed to the demands of misdirected public opinion, and President Taft had to bear the brunt of it all.' (*Forty Years in Washington*, 291.) The Ballinger case was discussed at length in a speech by Senator Fletcher, Jan. 19, 1911. (*Cong. Rec.*, 1087-1103.) See also S. Rept. 961, 61st Cong., 3d sess.

<sup>2</sup> *Cong. Rec.*, 1538.

<sup>3</sup> *Ibid.*, 1591. S. J. Res. 71.

Denby began in debate upon a resolution introduced by the minority leader, Robinson, 'That it is the sense of the United States Senate that the President of the United States immediately request the resignation of Edwin Denby as Secretary of the Navy.'<sup>1</sup> For nearly a fortnight this resolution was the main issue in the Senate. From the start it was evident that it was the Democrats' intent, if successful in this first attack, to launch similar resolutions against several other members of the Cabinet and other high officials in the hope of utterly discrediting the Republican Administration on the eve of the presidential campaign. Pepper protested against substituting denunciation for facts, and emphasized the point that in adopting this resolution the Senate might be prejudging a matter upon which later it might be called to sit in judgment under oath.<sup>2</sup>

By far the weightiest argument in opposition to the resolution was presented by Borah.<sup>3</sup> Adducing in support of his views the House debate in 1789 on the power of removal (especially the arguments advanced by Madison) and the protests made by Grant and Cleveland against the Tenure of Office Act's restrictions upon the President, he insisted that the right of dismissal belonged to the President alone. 'The President of the United States has had lodged with him, as President, the duty of executing the law, and therefore, as Madison says, he must have unhampered judgment and discretion in the retention of his instruments for the execution of the law.' The debate called forth keen attack and rejoinder.<sup>4</sup>

Borah: Of course we are passing this resolution upon the theory and in the hope that the President of the United States will accede to our resolution and dismiss Mr. Denby from office.

Glass: But not with the belief that we have any right to require the President to accede to our demand and dismiss this man.

Borah: If that be true, may I say to the Senator that we are voting for a resolution which it is conceded we have no right under the Constitution to pass.

<sup>1</sup> *Cong. Rec.*, 1547. S. Res. 134. Before this resolution was brought to a vote, it was modified by the author by prefacing it with a number of 'Whereases,' referring to the clauses of the lease-annulment resolution, just passed by unanimous vote. This presented the issue in distorted form, and strong protest was directed against it as unfair.

<sup>2</sup> *Ibid.*, 1733-34, 1984 ff.

<sup>3</sup> Feb. 8, 1924, *ibid.*, 2072-80.

<sup>4</sup> Asked why he invoked the power of the Senate by resolution to persuade the judgement of the President in the matter of recognizing the Soviet Government of Russia, and yet thought it improper to invoke the Senate's judgment to get rid of an officer, Borah replied that the two powers were entirely different, it having always been conceded that as a part of the treaty-making power it was perfectly within the rights of the Senate to pass resolutions concerning foreign relations.

Caraway: Suppose the President should dismiss a man from office, would the Senator say we would have no right to ask why?

Borah: Absolutely. Cleveland and the Democratic Senators settled that, and settled it correctly.

Caraway: To whom are we responsible?

Borah: To the same people; and the Senator is mistaken if he does not suppose that the people have as much confidence in the President ordinarily as they have in the Senate of the United States. I think they would much prefer to have the President responsible to them than to the Senate.

He declared that if Secretary Denby were guilty of the acts with which he had been charged, his dismissal would be wholly inadequate.

If he is guilty, he should have the stigma of impeachment placed upon him for all time. . . . If this resolution is passed, it will be in the face of the constitutional guarantee to the President of exclusive responsibility for his subordinate Federal officers. I would regard it as a calamity equal to that which we have now under consideration. [He closed with the words:] If the arguments urged for this resolution be well founded, then impeachment lies, and it is the one only effective, lawful, constitutional way of doing our full duty and meeting our solemn obligations to those who sent us here.

On February 9, debate began at noon, under a unanimous-consent agreement that after three o'clock each speaker be limited to ten minutes, and that the Senate would begin voting on the Robinson resolution and all proposed amendments at five o'clock, and should finally dispose of the matter before adjournment. On that day nine Senators took part in the debate.<sup>1</sup> Especially denunciatory were the speeches of La Follette and Johnson, both avowed candidates for the Republican nomination in the coming presidential campaign. After voting down two amendments, which would have substituted milder action, in the midst of tense excitement the final roll-call was taken. By a vote of 47 to 34 it was agreed to.<sup>2</sup> Instantly the minority leader sprung a motion that the Secretary of the Senate be directed to send a copy of the resolution at once to the President. It was passed by a vote of more than two to one.

<sup>1</sup> In favor of the resolution: La Follette, Johnson (Cal.), Swanson, Trammell, Heflin, Reed (Mo.); in opposition, Spencer, Couzens, and Reed (Pa.).

<sup>2</sup> While the resolution was pending in the Senate, Denby declared that he had no intention of resigning. He said: 'I want a record vote in the Senate on the Robinson resolution, so that I may determine what Senators are willing to besmirch and defame the name of an American citizen who is guilty of no crime and who has never been charged, tried or convicted in any court.' The record vote showed that the majority (47) included every Democrat but one, ten Republicans and the two Farmer-Labor members; the minority (34) included thirty-three Republicans and one Democrat.

Four hours later, from the White House there was issued a statement in which President Coolidge declared:

No official recognition can be given to the passage of the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under Executive control. . . .

I shall not hesitate to call for the resignation of any official whose conduct in this matter in any way warrants such action upon my part. The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an Executive function.

I regard this as a vital principle of our Government.

After citing Madison and Cleveland in support of that thesis, he continued:

The President is responsible to the people for his conduct relative to the retention or dismissal of public officials. I assume that responsibility, and the people may rest assured that as soon as I can be advised so that I may act with entire justice to all parties concerned and fully protect the public interest, I shall act.

I do not propose to sacrifice any innocent man for my own welfare, nor do I propose to retain in office any unfit man for my own welfare. . . .<sup>1</sup>

At a Lincoln's Birthday banquet in New York City, the next evening, the President said:

We propose to follow the clear, open path of justice. There will be immediate, adequate, unshrinking prosecution, criminal and civil, to punish the guilty and to protect every national interest. In this effort there will be no politics, no partisanship. It will be speedy, it will be just.<sup>2</sup>

A few days later, Secretary Denby resigned, because of his fear that his continuance in the Cabinet would increase the President's embarrassments, and expressing his appreciation of the many courtesies shown him by the President, and 'of your last great act in refusing to accede to the demand of the Senate that you ask for my resignation.' It was accepted by the President, with expressions of regret, and with the assurance: 'You will go with the knowledge that your honesty and integrity have not been impugned.'<sup>3</sup>

Meantime, the Attorney-General had also been brought under Senate fire. Upon the introduction of a resolution requesting the President to call for his resignation, Daugherty sent a letter to one of the Senators from his own state, asking that, before the Senate should take action on this resolution, he be given a hearing before a committee, and declaring: 'I am prepared at any moment, after

<sup>1</sup> *Washington Post* (Feb. 12, 1924), 1.

<sup>2</sup> *Ibid.* (Feb. 13, 1924), 4.

<sup>3</sup> *Ibid.* (Feb. 19), 1.

those pressing this resolution have been heard, to lay the whole matter before such committee.'<sup>1</sup> Among Republican leaders the opinion was growing that he was an incubus on the Administration. The press announced that at the White House Borah — who less than ten days before had been the strongest upholder of the view that the power of dismissal was in the President alone — 'confronted both the President and Mr. Daugherty with a demand that the latter step out of the Cabinet because the country had lost confidence in him.'<sup>2</sup> A few days later, Lodge and Pepper conferred with the President, urging Daugherty's retirement. In a spirit of fairness, Pepper wrote to Daugherty, telling him of the advice that had been given. To this Daugherty made an astute reply, protesting against being condemned unheard, by the Senate to which he had no access. If he were thus to be denied the right granted to the basest criminal, the right to a trial by his peers, then 'nothing remains for me to do except to plead my cause before the bar of public opinion . . . and present before that great tribunal all of the facts bearing upon these matters'.<sup>3</sup>

In view of the persistence with which he later resorted to every legal device to prevent most significant 'facts bearing upon these matters' being made public, this plea takes on the appearance of a gigantic bluff. Five weeks later, the President found himself compelled to request his resignation,<sup>4</sup> which was promptly submitted, but with renewed reference to the earlier tenders of his resignation and to the absence of evidence to support the charges against him.

Resolutions were introduced calling for the resignation of other high officials — the Secretary of the Treasury and the Assistant Secretary of the Navy. But the people were evidently becoming impatient and distrustful over these wholesale assaults, and, after having served their purpose as pegs on which to hang speeches, these resolutions were soon forgotten.<sup>5</sup>

I want no hue and cry, no mingling of innocent and guilty in unthinking condemnation, no confusion of mere questions of law with questions of fraud and corruption.

In these words on the day following the Senate's demand for the resignation of the Secretary of the Navy, President Coolidge voiced

<sup>1</sup> *Washington Herald* (Feb. 12, 1924), 2.

<sup>2</sup> *Washington Post* (Feb. 19, 1924), 1.

<sup>3</sup> *Ibid.* (Feb. 22, 1924), 1.

<sup>4</sup> *Ibid.*, March 28, 1924.

<sup>5</sup> *Ibid.* (Feb. 13, 1924), 4.

not only his own wish but that of the rank and file of cool-headed American citizens. It is true that in 1924 Senate investigations had disclosed facts which placed in question not only the competence but the integrity of more than one member of the Cabinet. The charges called for the most searching inquisition; if proved, mere dismissal would have been an utterly inadequate penalty. For such a situation the framers of the Constitution made provision in impeachment, with procedure analogous to that of a court. Instead, a majority of the Senators preferred by direct resolution to demand dismissal; and the orgy of gloating denunciation indulged in by those who thought they could make political capital for themselves or for their party daily bore testimony to the truth of the saying of one who had been a Representative, Senator, and President of the United States: 'A deliberative assembly is the worst of all tribunals for the administration of justice.'<sup>1</sup>

In the days when the Senate clamor for Seward's removal was loudest, Greeley wrote:

Let the President judge. A President who could stoop to throw a head to any mob which may approach his window would soon degenerate into a mere convenience of the lowest and vilest intriguers for place and power. Mr. Lincoln, we are sure, will not fear to be just.<sup>2</sup>

That the people were more impressed by President Coolidge's courage and will to do justice than by the 'hue and cry' that for many weeks had raged in the Senate, was abundantly proved by their verdict at the polls in the following November.

Probably no other American head of a department was ever so persistently nagged through a long period of years as was Andrew W. Mellon, Secretary of the Treasury from 1921 to 1932. Most of the many resolutions calling directly or indirectly for his resignation were initiated by two Senators. Couzens was sponsor for a resolution calling for the appointment of a special committee to investigate the Bureau of Internal Revenue.<sup>3</sup> Its apparent intent was to discredit the Secretary of the Treasury. Its methods and results have been discussed elsewhere.<sup>4</sup>

McKellar attacked the Secretary from another angle. By his resolution, agreed to by the Senate, the Committee of the Judiciary

<sup>1</sup> John Quincy Adams, quoted by L. G. McConachie, *Congressional Committees*, 71.

<sup>2</sup> Quoted in *Washington Post* editorial, Feb. 14, 1924.

<sup>3</sup> S. Res. 168, March 12, 1924.

<sup>4</sup> Pages 561-63.

was authorized to investigate and determine whether Mellon was directly or indirectly 'carrying on the business of trade or commerce' and holding the office of Secretary of the Treasury in violation of law.<sup>1</sup> During the debate, Reed (Pennsylvania) stated that before accepting the office Mellon had sought the advice of Philander C. Knox, who had informally expressed the view that he was eligible, and had fortified his opinion by securing an elaborate study of the case by experts.<sup>2</sup> This resolution was considered at length, and placed on the calendar, but not brought to a vote.

Two years later, there was long debate over various resolutions seeking through the Committee on the Judiciary to secure from the Federal Trade Commission information as to monopolizing or other unfair practices alleged against the Aluminum Company of America, in the control and management of which it was charged that Mellon had continued to have a large part since becoming Secretary of the Treasury.<sup>3</sup> A resolution authorizing the President, with consent of the Senate, to determine whether the Aluminum Company had been guilty as alleged, was rejected by a vote of 33 to 33.<sup>4</sup>

In 1928, Couzens returned to the attack with a resolution, introduced by nineteen condemnatory 'Whereases,' declaring: 'It is the sense of the Senate that Andrew W. Mellon should resign as Secretary of the Treasury.'<sup>5</sup> McKellar brought reinforcements by securing

<sup>1</sup> S. Res. 200, March 28, 1924. The precedent repeatedly cited in the discussions of Mellon's eligibility was that of A. T. Stewart, the New York 'merchant prince' whom President Grant named for Secretary of the Treasury. This nomination, with all the others for Cabinet positions, was promptly and unanimously confirmed. Two days later, however, it was discovered that under the law of Sept. 2, 1789, he was ineligible, inasmuch as he was undoubtedly 'directly or indirectly concerned or interested in carrying on the business of trade or commerce.' Stewart, himself, was willing to transfer his business during his term to trustees who would give all its profits to charity, but there were grave doubts as to whether the requirements of the law could be fulfilled in that way. The President asked Congress by joint resolution to exempt Stewart from the operation of the law. (Special messages to the Senate, March 6 and 9, 1869.) Sherman sought to introduce a bill repealing such portions of the law as made Stewart ineligible, but Sumner's objection prevented such summary action. (Compare with the passage of the special act which temporarily removed the barrier to Knox's becoming Secretary of State in 1909, p. 184.) March 9, Grant withdrew his request, and appointed G. S. Boutwell 'to fill a vacancy' in the office of Secretary of the Treasury. (J. F. Rhodes, *History*, VI, 237-38.)

<sup>2</sup> Their reports are printed in *Cong. Rec.* (1924), 5446-49.

<sup>3</sup> S. Res. 109, 110, 141.

As to Mellon's relation to the Aluminum Company of America, see deposition made by him in litigation growing out of the merger between that company and the Canadian Development Company in 1925. This deposition constitutes Exhibit B, in Senate Report 7, 71st Cong., 1st sess. This report was printed in *Cong. Rec.*, 1007-28, May 9, 1929.

<sup>4</sup> Feb. 25, 1928.

<sup>5</sup> March 20, 1928. Debate, *Cong. Rec.*, 5145-54.

the printing of his 'similar resolution' of March 31, 1924, together with a list of thirty-eight so-called 'Mellon Enterprises.' The Secretary's supporters succeeded in preventing this resolution's coming to a vote.

Immediately after his inauguration, President Hoover made eight new nominations for positions in his Cabinet, all of which were at once confirmed. But he named no new heads for the Treasury and Labor Departments, and Andrew W. Mellon and James J. Davis, respectively continued to hold these positions to which they had been appointed eight years earlier by President Harding.

The very next day the Senate directed its Judiciary Committee to inquire and report (1) whether it was legal for a department head to continue to hold office, without having been renominated, after the expiration of the term of the President who appointed him, and (2) whether Secretary Mellon could legally hold his office in view of the statutory requirement that the Secretary of the Treasury should not be engaged in 'carrying on the business of trade or commerce.' In their report, submitted two months later, the committee members were unanimous in their opinion that, with the exception of the Postmaster-General, whose term of office is prescribed by statute, it is legal for a Cabinet member to continue to hold office in a new Administration without having been renominated.<sup>1</sup> There were cited not less than 110 instances of such continuance between 1793 and 1929. Nine members — a bare majority — concurred in reporting that in their opinion Mr. Mellon 'may and does legally hold the office of Secretary of the Treasury.'

Upon the facts which the Committee has considered . . . no contrary conclusion can properly be reached except through duly instituted criminal proceedings or impeachment proceedings originating in the House of Representatives.

<sup>1</sup> Jan. 24, 1918, the Senate debated, but tabled, Hardwick's resolution (S. Res. 175): 'That the President of the United States be requested to inform the Senate, if not incompatible with the public interest, by what warrant or authority the several heads of the Executive Department hold their offices.' *Cong. Rec.*, 1211.

S. Rept. 7, submitted May 7, 1929; reprinted May 9, in *Cong. Rec.*, 1007-28. Rarely has so blurred a report been submitted. Four members, headed by the Chairman, presented 'Minority Views,' adducing the reasons for their conclusion that Mellon's holding his office was illegal. Three members, headed by Borah, submitted 'Views,' to the effect that the ambiguous law should be 'made plain by specifying what interests, if any, the official may have, and what constitutes "carrying on the business."' They declined to express an opinion as to 'whether as a stockholder Mr. Mellon has actually counseled and advised or been interested in the carrying on of the business in which he is a stockholder.' Three members submitted 'Individual Views' — Ashurst's being that, upon this particular question, the committee should reply that the Senate has no jurisdiction.

The members of the committee made it clear that they felt there was an incongruity, if not an impropriety, in the Senate's resolution directing them to pass upon the 'legality' of Secretary Mellon's holding his office. While this resolution was under debate, Chairman Norris declared:

We should not express in advance an opinion, either as to fact or law, on the action of a public official who, under the Constitution, is liable to impeachment by the House and trial by the Senate.

Any such 'advance opinion' could not fail to cause serious embarrassment if the House should later present the official for trial by the Senate upon impeachment charges.

This 'omnibus' report gave rise to spirited debates. Statements by a large number of former Secretaries of the Treasury were presented, showing that, from the days of Alexander Hamilton down, a great number of holders of that office had owned corporation stock.<sup>1</sup> Perplexed by so many varieties of expert counsel, the Senate took no action, and Secretary Mellon continued to head the Treasury Department without further formal challenge.<sup>2</sup>

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#### REMOVAL UNDER GUISE OF RECONSIDERATION

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In 1930, conditions arose which suddenly attached extreme importance to the Senate's rule as to the reconsideration of the Senate's confirmation or rejection of appointments:

When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate....

<sup>1</sup> Of special interest was the letter of Leslie M. Shaw, Secretary of the Treasury under President Roosevelt, to Senator Steiwer. Press dispatches of May 3, 1929.

<sup>2</sup> Shortly after this debate, *à propos* of a newspaper dispatch that he was about to resign, Secretary Mellon issued a statement: 'My attitude as to the question of resignation is the same as Benjamin Franklin's was under similar circumstances, when he said: "I am deficient, I am afraid, in the Christian virtue of resignation."'

Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate. (Rule XXXVIII, pars. 3 and 4.)

At the opening of the session, December 1, 1930, there were submitted to the Senate five nominations for the newly created Federal Power Commission. Two of these nominations were promptly confirmed, but the other three were held for further investigation in the committee, where special inquiries were made as to the attitude of these men toward the government ownership of power projects.<sup>1</sup> All three of these nominations were confirmed late at night, December 20, just before Congress recessed for the holidays, and the Secretary of the Senate on that same date notified the President of those confirmations. Three days later, the chairman and the two other appointees who were in Washington took the oath of office and organized. Without waiting for the arrival of their colleagues, in one of their first executive orders they notified all employees of the old commission that, under the new law, their employment was automatically terminated, but announced that arrangements had been made with Civil Service Commission to continue temporarily the clerical employees, and that further action upon a solicitor and an accountant and others was deferred until a meeting of the full commission to be held early in January. All employees, however, were informed they could apply for reappointment and their applications would be examined.

The precipitancy with which this action was taken was characterized as 'indecent haste' by critics in the Senate who asserted that the two officers upon whom specifically action was deferred were 'known all over the United States as the two public officials who had stood for honesty in dealing with power companies in the [former] Commission.'<sup>2</sup> On the other hand, Chairman Smith declared that immediate action had been necessary as to the clerical employees in order that there might be no interruption in the routine activities in the shift from one commission to another.

<sup>1</sup> The one selected for special questioning was the designated chairman, George Otis Smith, for thirty years member and head of the Geological Survey.

<sup>2</sup> 'As all the world knows, this hasty and huddled order raised a storm, and discredited the Commission with a large section of Congress, upon which it depends for its own existence. Three of the Commissioners are not fitted for their occupation. An omniscient person never sets fire to his own house.' Charles A. Beard, 'President Hoover's Appointments,' *New York Nation*, Aug. 22, 1931.

Question was at once raised whether the confirmation of these three commissioners could not be reconsidered. As soon as Congress convened, after the recess, Walsh (Montana) took the lead in forcing that issue. His contention was that the Senate had not completed its action of approval until the time for reconsideration had expired. After five days of debate, the Senate voted to reconsider its confirmation of three members of the Power Commission, and requested the President to return their nominations.<sup>1</sup>

The President replied in a curt message, citing the formally attested resolutions of the Senate's confirmation of these nominations under date of December 20, and ending thus:

I am advised that these appointments were constitutionally made, with the consent of the Senate, formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices.

I cannot admit the power of the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

I regret that I must refuse to accede to the requests.<sup>2</sup>

In the vigor of the President's 'declaration of independence' against what he considered attempted dictation by the Senate, the Hoover message ranks with those of Jackson, Cleveland, and Coolidge.<sup>3</sup> From the press and from the public the preponderant reaction was that of hearty approval. But in the Senate the message and the statement were taken as a challenge. Montana leapt to the Senate's defense. After an hour's debate, Walsh's unprecedented motion, to

<sup>1</sup> Jan. 9. The vote stood: For reconsideration, 44 — 13 insurgent Republicans, 30 Democrats, 1 Farmer-Labor; against reconsideration, 37 — 32 Republicans, 5 Democrats. This motion, to reconsider the nomination of officers who had already been sworn in, is believed to have been without precedent. The vote was taken on Smith. On the other two, a record vote was not taken.

<sup>2</sup> On the same day the President issued a statement to the nation, in which he denounced the Senate's action as 'an attempted invasion of the authority of the Executive,' and as an effort to place 'a false issue before the country.' He bluntly imputed to those who had voted for reconsideration a political motive — 'to give rise to a legend that those who voted for it are "enemies of the power interests" and, inferentially, those who voted against it are "friends of the power interests," and it may contain a hope of symbolizing me as the defender of power interests, if I refuse to sacrifice three outstanding public servants, or to allow the Senate to dictate to an administrative board the appointment of its subordinates, and if I refuse to allow fundamental encroachment by the Senate upon the constitutional independence of the Executive. Upon these things the people will pass unerring judgment.' Jan. 10, 1931, *Cong. Rec.*, 1979.

<sup>3</sup> Pages 976 ff.; 807 ff.; 562 ff.

instruct the Clerk to reinsert the names of the three commissioners in the Executive Calendar, was adopted.<sup>1</sup> Wheeler gave notice that he would later move that no appropriations be permitted for these commissioners' salaries during the ensuing year.<sup>2</sup> A few days later, on Walsh's motion the Senate sent back the three nominations to the Interstate Commerce Committee. When they were again reported to the Senate, they were again considered. By a vote of 40 to 33 the Senate now refused to confirm the nomination of Chairman Smith, but by narrow votes the other two were approved. An earlier motion of Walsh's, which was approved by the Judiciary Committee, was then passed, requesting the District Attorney for the District of Columbia to institute *quo warranto* proceedings in the Supreme Court of the District of Columbia to test the right of Chairman Smith to hold his office.

By this court Smith's title was affirmed. On appeal the case was taken to the United States Supreme Court, which consented to take jurisdiction of the whole question involved.<sup>3</sup> May 2, 1932, Mr. Justice Brandeis read the opinion of the Court, to which no dissent was announced. It was held that the Senate was without authority to recall a nomination after its Secretary, as instructed by unanimous consent, had informed the President that the Senate had confirmed the nomination, and the appointee had taken the oath of office.<sup>4</sup> Chairman Smith continued to hold his office until his voluntary resignation.

#### THE SUPREME COURT'S DECISIONS AS TO THE POWER OF REMOVAL

##### *Myers v. United States*

After the scope of the President's constitutional power of removal had been in controversy both academic and political for nearly a hundred and forty years, an opinion was finally rendered upon that question in the case of *Myers v. United States*.

Frank S. Myers had been appointed postmaster of Portland,

<sup>1</sup> Walsh, himself, at this stage said that further action by the Senate was likely to be entirely futile.

<sup>2</sup> In the House, La Guardia's similar motion was defeated by a vote of 102 to 37.

<sup>3</sup> How important the issue was considered is evidenced by the Senate committee's securing the services of John W. Davis, former Ambassador to England, and of ex-Governor Alexander J. Groesbeck of Michigan, to sustain their contention, while the defense of the validity of Smith's title was assigned to the Attorney-General, William DeW. Mitchell, and ex-Senator George W. Pepper, who presents the background of the case in *Family Quarrels*, 101-04.

<sup>4</sup> U.S. *v.* George Otis Smith, 286 U.S. 6.

Oregon, by President Wilson, July 2, 1917, under an Act of Congress which provided:

Postmasters of the first, second and third classes shall be appointed and may be removed by the President, by and with the consent of the Senate, and shall hold their offices for four years, unless sooner removed or suspended according to law.

In 1920, the President, without obtaining consent of the Senate, removed Myers, who then proceeded to bring suit for his salary for the remainder of his term. The Supreme Court heard the case, on appeal from the Court of Claims, in 1924, but, wishing to secure further light, assigned it for reargument, at which time the Solicitor-General, James M. Beck, contended that the Act of 1876 was invalid, and insisted upon the unconstitutionality of any restriction upon the President's power of removal. Senator George Wharton Pepper appeared *amicus curiae*.<sup>1</sup> He maintained the Senate's right to a share in the power of removal, and insisted that Congress could place upon the President's power of removal any restriction it desired. The Court's task was peculiar, for, as Professor Lindsay Rogers says, it undertook to interpret, not what the Constitution did say, but to determine what the Constitution would have said on such a subject if the Constitution had not been silent! The Chief Justice himself declared: 'This Court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided.'

The decision of this case was rendered October 25, 1926. Chief Justice Taft presented the majority opinion, in which five of the Associate Justices concurred with him. Dissenting opinions were presented by three, Associate Justices Holmes, McReynolds, and Brandeis. The question at issue was one with which the Chief Justice had long and often been brought in contact. The ex-President, speaking now as Chief Justice in interpreting the Executive's power, in one of the lengthiest opinions ever rendered, declared the decision of the Court, holding correct the view which had prevailed in the First Congress. Referring to Hamilton's oft-quoted comment in the *Federalist* — 'The consent of that body [the Senate] would be necessary to displace as well as to appoint' — he insisted that Hamilton later changed his views, and quoted the direct opinion as to the

<sup>1</sup> Pepper had been named by President *pro tempore* Cummins, at the request of the Court that someone be suggested to represent the views of the Senate. Later, there was some criticism, to the effect that the Senate itself had had no part in authorizing him to represent the Senate.

power of removal which he expressed while Secretary of the Treasury:

The general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument. (These he explicitly enumerated: Participation of the Senate in the appointment of officers and in the making of treaties; the right of Congress to declare war and grant letters of marque and reprisal.) With these exceptions the executive power of the United States is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts upon full consideration and debate; of which the power of removal from office is an important instance.<sup>1</sup>

The Court's conclusions were:

It therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so....

The provision of the law of 1876, by which the unrestricted power of removal of first-class postmasters is denied to the President, is in violation of the Constitution and invalid.

The opposing view was presented in the long and able dissenting opinions of Justices McReynolds and Brandeis, based upon exhaustive research. In his characteristically pungent opinion of but two paragraphs, Mr. Justice Holmes declared:

We have to deal with an office that owes its existence to Congress and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers upon the President the power to appoint to it and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in

<sup>1</sup> J. C. Hamilton, *Works of Hamilton*, VII, 80-81. He cited also Chief Justice Marshall's comment upon this debate in the First Congress, and the bill's amendments adopted by the House for the express purpose of 'implying the power of removal to be solely in the President': 'As the bill passed into a law, it has ever been considered as a full expression of the sense of the legislature on this important part of the American Constitution.' This was his view some forty years after the debate. *Life of Washington* (Revised edition), V, 192-200.

The most pertinent precedent cited in the Taft opinion was *Parsons v. U.S.*, 167 U.S. 324.

Hamilton's statement is in almost exact repetition of words used by Madison in the historic House debate: 'Inasmuch as the power of removal is of an executive nature, and not affected by any constitutional exception, it is beyond the power of the legislative body.' *Annals of Congress*, I, 482. Writing only four years later (June 29, 1793), Hamilton seemed to accept this construction without regret or dissent.

accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.<sup>1</sup>

This long-awaited decision, by which the Court asserted the President's unrestricted power of removal as inherent in the Constitution's vesting in him 'the executive power' and committing to him the duty to take care that the laws be faithfully executed, called forth much adverse comment. Some critics frankly avowed their belief that the mainspring of the decision and its only conceivable justification was to be found in the judgment of the majority that the decision was one which ought to be reached, 'irrespective of lame logic, inconclusive language, and history far from compelling.'

In accordance with the decision in *Myers v. the United States*, the President, subject to no restraint by the Senate, may remove any officer whom he has appointed with its consent. He may thus work his will, even in ousting members from the great semi-judicial boards and commissions which have been created by Act of Congress with the intent that their work should be free from executive domination. Professor Howard Lee McBain summed up the situation produced by the Supreme Court's decision thus:

It gives him full rein. Judges excepted, he may return every presidential appointee to private life at a stroke of the pen. But . . . it is difficult to see what a President will gain by making an opposed removal only to submit to dictation in respect to a successor in the office. It is possible, therefore, greatly to exaggerate the institutional consequences of the decision. Congress, if it be wise, will continue to impose restrictions on the President's power of removal whenever it deems restriction expedient as in the case of the Comptroller General. These will not be legal compulsions; but they may serve as danger signals. . . . Six of the nine Supreme Court Judges have decided that the legal compulsions no longer exist. Congress and public opinion will determine how many danger signals are set up.<sup>2</sup>

<sup>1</sup> For Justice Holmes's first paragraph, see p. 784.

<sup>2</sup> H. L. McBain, 'Consequences of the President's Unlimited Power of Removal,' *Political Science Quarterly*, Dec., 1926. Comment upon this important case has been very voluminous, especially from adverse critics. The opinions as well as the briefs and arguments of counsel are presented in S. Doc. 174, 69th Cong., 2d sess. Ex-Senator Pepper discusses the case in *Family Quarrels*, 121-32. Of especial interest because of his official connection with the case is his forecast as to the possible consequences of the decision: (1) That the majority's view will be accepted as a rule of decision in all cases to which the majority's reasoning is applicable. 'No matter how necessary and proper it may be to give tenure in the executive branch to any class of public servants

*Humphrey's Executor (Rathbun) v. United States*

The Supreme Court's construing of the power of removal was materially modified by its decision in *Humphrey's Executor (Rathbun) v. United States*, rendered May 27, 1935. Shortly after taking office, President Roosevelt requested the resignation of William E. Humphrey, a member of the Federal Trade Commission, serving on a reappointment for a term of seven years which would expire September 25, 1938. The President made this request on the ground that 'the aims and purposes of the Commission can be carried out most effectively with personnel of my own selection,' but he disclaimed any reflection upon the commissioner personally or upon his services. Humphrey asked time to consider. Some weeks later the President again wrote:

You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administration of the Federal Trade Commission, and, frankly, I think it best for the people of this country that I should have a full confidence.

Humphrey declined to resign. October 7, 1933, he received this executive order: 'Effective as of this date you are hereby removed from the office of Federal Trade Commissioner.' In this action Humphrey never acquiesced; he continued to insist that he was still a member of the commission, entitled to perform its duties, and receive the compensation provided by law at \$10,000 per annum. Action was instituted in the United States Court of Claims. Humphrey died February 14, 1934, but the executor of his estate, Samuel F. Rathbun, continued to press the suit. Presently the Court of Claims certified two questions to the United States Supreme Court:

1. Do the provisions of Sec. 1, Federal Trade Commission Act, stating: 'Any Commissioner may be removed for inefficiency, neglect of duty, or malfeasance in office,' restrict or limit the power of the President to remove except upon one or more of the causes named?

(If the Court's answer is 'Yes')

and to protect them against ruthless presidential removal, this doctrine leaves Congress powerless to provide such safeguards unless and until by constitutional amendment a remedy is provided.' (2) That the decision will be treated as applicable only to a precisely similar state of facts. (3) That the whole subject will be re-examined, the decision overruled, the reasoning of the majority repudiated, and a doctrine enunciated more consonant with established constitutional practice.

See also: Edward S. Corwin, 'Tenure of Office and Removal Power under the Constitution, *Columbia Law Review*, April, 1927, especially pp. 387-96, and *The President's Removal Power*; James Hart, *American Political Science Review*, Aug., 1929; W. W. Willoughby, *The Constitutional Law of the United States* (1929), 1513-22; Lindsay Rogers, *The American Senate*, 32-45.

2. Is such a restriction or limitation valid under the Constitution of the United States?

The reply of the Court, May 27, 1935, was a unanimous 'Yes' to both of these questions.

Speaking for the Court, Mr. Justice Sutherland set forth the provisions of the Act of Congress which created the Federal Trade Commission, leading inevitably to the conclusion: 'The intent of the Act was to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here.' In reporting the bill from committee, Senator Newlands had declared that the tribunal should be 'independent of any department of the government, . . . a board or commission of dignity, permanence and ability, independent of executive authority except in its selection.' The entire debate upon the bill contained nothing to the contrary.

As to the decision in *Myers v. United States*, on which the Government placed chief reliance, Mr. Justice Sutherland said:

The narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by the Act of Congress. In the course of the opinion of the Court, expressions occur which tend to sustain the Government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. . . .

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision. A postmaster is an executive officer restricted to the performance of executive functions. . . . The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the Executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.

Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers, and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

In accordance with this decision, hereafter the provision by Act of Congress requiring the advice and consent of the Senate or of Congress for the removal of an officer not 'purely executive' should put a curb upon a President's attempting by autocratic removals to make over a great 'independent agency' like the Interstate Commerce Commission, the Federal Trade Commission, or the Federal Reserve Board, until 'its mind and his mind shall go along together' on its policies and administration, thus thwarting the will of Congress which had created the commission with the clear intent that it should be entirely 'independent of executive authority except in its selection.'<sup>1</sup>

Five Justices who had concurred with Chief Justice Taft in the Myers decision in 1926 shared in this unanimous Humphrey decision, nine years later. Candidly recognizing that between the two there might remain a 'field of doubt,' the Court declared: 'We leave such cases as may fall within it for future consideration and determination as they may arise.'<sup>2</sup>

Within that 'field of doubt' three years later fell the case of Arthur E. Morgan.

*The Removal of Arthur E. Morgan, Chairman of Board of the Tennessee Valley Authority (1938)*

Soon after the appointment of the board of directors of the TVA, friction developed within the board. Repeatedly, but unsuccessfully, during a long period of time Chairman Morgan 'endeavored to secure the President's adequate consideration of grave conditions within the TVA.' Presently the President gave publicity to a letter from the other members of the board saying that they could no longer work with the chairman, who, they declared, was pursuing a 'rule or ruin policy'; they suggested that he resign. Chairman Morgan then allowed publication of a statement in which he accused his co-directors of making 'explicitly false reports' to the President, to Congress, and to the public, and declared that they were pursuing a policy that was 'a menace to good government,' and with 'evasion, deceit, and misrepresentation.'

<sup>1</sup> For earlier instances of a President's seeking by devious ways to make over to his liking commissions which Congress had designed to be quasi-judicial or legislative, see speech by Norris, *Cong. Rec.*, 1819, Jan. 16, 1926, and comment by Lindsay Rogers, *The American Senate*, 40-48. The commissioners whom the President sought to displace were Bert E. Haney of the U.S. Shipping Board and David J. Lewis and W. S. Culbertson of the Tariff Commission (p. 559).

<sup>2</sup> *Humphrey's Executor (Rathbun) v. United States*, 295 U.S. 602; decided May 27, 1935.

March 11, 1938, in his office at the White House President Roosevelt brought face to face the three members of the board, in an attempt to end the bitter controversy. He admonished them that they owed it to the country not to continue to jeopardize the public welfare by personal differences, and added that any member who could not find the way clear 'to work in harmony — should resign.' Two later meetings were held in the President's office, but no agreement was reached.

Throughout the three White House 'hearings' Chairman Morgan took the attitude that — since the President not only had not granted his request that the other directors be required to make available data and assistance essential for his preparing a report upon the grave condition in TVA, but had made no alternative suggestion — the hearings could not be effective or useful fact-finding occasions; and, since Congress had already taken up the matter of the TVA administration, in his belief under the terms of the TVA Act any report by him should be filed with the President and with Congress.

To the President's demand for a 'Yes' or 'No' reply to the question whether he was willing to answer questions by the President or his assistants, Morgan replied: 'For reasons which I have given at the two conferences already held, I feel impelled to say that I cannot participate further in these proceedings.'

The President then read his 'findings': That the Chairman had failed to sustain the grave charges he had made against his fellow directors; that their accusations against the Chairman must be accepted as true, he having refused to testify; and that the Chairman was guilty of insubordination and contumacy in refusing to submit to the Chief Executive's demand for any facts upon which he had based charges of dishonesty and want of integrity on the part of his fellow directors. Telling Chairman Morgan that the only alternatives would be suspension or removal as a member of the Board of TVA, the President made formal request that he withdraw such charges and give assurances that he would in future loyally co-operate with his fellow directors in carrying out the powers of the TVA Act.

Chairman Morgan made immediate and direct reply: 'I deny the accuracy and adequacy and representativeness of the statement you made. I do not tender my resignation. I wish also to say that I challenge the suggestion and deny the right and the power to remove or to suspend me.'

Never before had a President of the United States received from one of his appointees, face to face, so deliberate and direct a challenge

of his power. Since Chairman Morgan declined to tender the wished-for resignation, the President promptly sent to Congress, March 23, a message announcing that, upon advice from the Department of Justice that he was acting clearly within his constitutional rights, he had dismissed Morgan as member and chairman of the TVA Board.<sup>1</sup>

Thus, the investigation and the settlement of the TVA controversy were shifted from the White House to the Halls of Congress and the Supreme Court Chamber.<sup>2</sup>

<sup>1</sup> With his message he transmitted to Congress the opinion given him by the Solicitor-General, a transcript of the White House 'hearings' of March 11, 18, and 21, and other pertinent documents.

<sup>2</sup> July 6, 1938, Dr. A. E. Morgan filed suit in the chancery court of Knox County, Tenn., naming the TVA as a corporation and his former co-directors (H. A. Morgan and D. E. Lilienthal) as defendants. He asked for payment of back salary from the date of his 'attempted removal,' and a declaratory judgment decreeing that his 'attempted removal' and the 'attempted' designation of H. A. Morgan as chairman of the TVA board are wholly invalid and void; that he (A. E. Morgan) is still a member and chairman of the board of directors, and that the defendants (H. A. Morgan and D. E. Lilienthal) be ordered to recognize him as a member and chairman of the board. It is not to be expected that — as in the Humphrey case — the Supreme Court will by unanimous vote decide against the President's action. For, as indicated in the Solicitor-General's advice to the President, in several respects the law which created the TVA is easily to be distinguished from that which created the Federal Trade Commission. Moreover, two of the Justices who concurred in the Humphrey decision have been succeeded by Justice Black, from whom a vote adverse to the President's claim of this removal power is inconceivable, and Justice Reed, who as Solicitor-General had made a strong presentation of the Government's case when the removal of Humphrey was before the Supreme Court.

Before the order for the removal of Morgan had been issued, heated debate was in progress in both branches of Congress over divers resolutions calling for drastic investigation of the TVA situation by committees of Congress. The majority leader in the Senate, Barkley, secured approval for a compromise joint resolution which in its final form provided that the investigation should be by a joint committee, consisting of five Senators named by the President of the Senate and five Representatives named by the Speaker of the House. (The Speaker consulted party leaders, and allowed the minority leader to name the two Republicans. Vice-President Garner, with the ready acquiescence of the party leaders on both sides, announced his own personal selections. Several men sought eagerly for places on the committee for its publicity value, but no members were appointed who had been active in debate on either side in relation to TVA controversies.)

The committee thus appointed under the provisions of Joint Resolution 277 was authorized to make a 'full and complete investigation of the administration of the TVA Act, including the following, but not excluding any other matters pertaining to the administration and policies.' There followed specifically lettered subjects for investigation from 'a' to 'r' including apparently all the charges and countercharges made by the opposing factions in the board. The committee was to choose its own chairman; its expenditures were not to exceed \$50,000; and it was to report not later than Jan. 3, 1939. 'All hearings, orders, or decisions held before or made by the joint committee shall be public.'

It was to secure, at the hands of such a committee, a thorough and impartial investigation of the actual conditions in the TVA administration that Chairman Morgan was willing to face the charge of 'contumacy' and the chance of being ousted from his position of high trust and responsibility.

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## XV

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'THE HIGH COURT OF IMPEACHMENT'

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Congress has no power over the person, but only over the office. A removal by impeachment is nothing more than a declaration by Congress to this effect: 'You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. We want your offices for the purpose of giving them to men who will fill them better.'

SENATOR WILLIAM B. GILES (1804)

It does seem to me a very strange thing that a judge [Senator], by whose vote alone the President can be removed, should declare he must be removed. . . . Shall we, the judges, decide beforehand that the President ought to be removed?

SENATOR JOHN SHERMAN (1868)

I do not recognize your right to demand that I vote either for or against conviction. I have taken an oath to do impartial justice . . . and I trust I shall have courage and honesty to vote according to the dictates of my judgment and for the highest good of my country.

SENATOR EDMUND G. ROSS (1868)

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# XV

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## 'THE HIGH COURT OF IMPEACHMENT'

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### THE TRIAL OF IMPEACHMENTS ASSIGNED TO THE SENATE

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The Senate shall have the sole power to try all impeachments.

FAMILIAR precedent suggested this assignment. In England impeachments instituted by the Commons had been tried by the House of Lords from the days of the Good Parliament,<sup>1</sup> and while the Federal Convention was in session the trial of Warren Hastings 'still lingered at Westminster,' and its proceedings were cited in the Convention's debates. American colonial precedent also suggested the exercise of this function by the Senate. Under Penn's Frame of Government of Pennsylvania impeachments by the assembly were tried by the council;<sup>2</sup> and in several of the colonies, without definite charter authorization, the assemblies exercised the power to impeach various officers before their respective councils.<sup>3</sup>

Most of the original state constitutions, framed between 1776 and 1780, made provision for impeachments being brought to trial by the assembly before the upper branch of the legislature or some other tribunal, such as the executive council. In Pennsylvania in 1780 a judge had been impeached before the council, and James Wilson, a notable member of the Convention of 1787, had been one of the attorneys who secured his acquittal.<sup>4</sup> There are close resemblances between the impeachment provisions of the New York, New Hamp-

<sup>1</sup> Trial of Lords Latimer, Neville, and others, 1356.

<sup>2</sup> F. N. Thorpe, *American Charters, Constitutions, and Organic Laws*, 3065 and 3067.

<sup>3</sup> Mass.; N.C.; S.C. Roger Foster, *Commentaries on the Constitution of the United States*.

<sup>4</sup> R. Foster, *Commentaries*, 659-60.

shire, and Massachusetts constitutions. In fact, the Massachusetts provisions are almost identical in language with the clauses finally adopted in the Federal Constitution.

However, in the Convention there was great hesitation to devolve this function upon the Senate. Both Madison and Pinckney opposed the proposal, urging that the President would thus be made too dependent on the Legislature.<sup>1</sup> But, although in early drafts the trial of impeachments was assigned to the 'national judiciary,' the delegates feared that the Supreme Court would be too small, too liable to be warped or corrupted, to be entrusted with this power.<sup>2</sup>

In the *Federalist* it fell to Hamilton — who in the Convention had advocated trial of impeachments by the chief justices of the supreme courts of the several states — to champion the choice of the Senate as the proper tribunal. There was need of his defense; for this feature of the Constitution had been vigorously attacked by Luther Martin.<sup>3</sup>

At the outset Hamilton declared that a 'well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective.' He cited the precedent of impeachment trials by the upper branch in the British Parliament, and in several of the state legislatures, and pointed out the reason why neither the Supreme Court in combination with the Senate, nor a court wholly distinct from the other departments of government could prove a satisfactory substitute for the Senate as the body before which this 'national inquest into the conduct of public men' should be presented. He then proceeded to reply to the objections which had been raised to the Senate as the trial court: the confounding of legislative and judiciary authorities in the same body; the contributing of an 'undue accumulation of power' in the Senate; the danger that the Senate, having sanctioned the President's appointments, would feel a bias toward those appointees; and that the Senators, because of their association with the President in treaty-making, might be made their own judges.

Among the early commentators on the Constitution, Judge Rawle<sup>4</sup> insisted that 'we can discover in no other division of the government a greater probability of independence and impartiality.' Judge Story<sup>5</sup> argued at great length in vindication of the choice of the

<sup>1</sup> Madison, *Debates*, 536.

<sup>2</sup> Nos. 65 and 66.

<sup>3</sup> Letter, Elliot, *Debates* (2d ed.), I, 379-80.

<sup>4</sup> William Rawle, *A View of the Constitution of the United States* (1829), ch. XXII, 213-15.

<sup>5</sup> Story, *Commentaries*, 758-75.

Senate for this task, and was especially emphatic in showing the embarrassments and dangers which would be involved if the trial of impeachments were devolved upon the Supreme Court.

If imitation indicate approval, the action of the states has been significant, for in forty-five out of the forty-eight — the exceptions are New York, Oregon, and Nebraska — impeachments are tried before the upper house of the legislature.<sup>1</sup> Nevertheless, from the first there have been outspoken critics of the Senate's fitness for this task, and it must be acknowledged that the changes which nearly a century and a half have made in the Senate have not been in the way of better adapting it to the performance of this quasi-judicial function.

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#### THE INITIATION OF IMPEACHMENT PROCEEDINGS

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In instituting impeachments the Senate has no part.<sup>2</sup> Its first official intimation that a trial is about to take place comes when a messenger from the House presents himself with the announcement that managers have been appointed on the part of the House to go to

<sup>1</sup> R. Foster, *Commentaries*, 528.

<sup>2</sup> William Rawle (*A View of the Constitution*, 216) held that, while it would be the duty of the Senate to communicate to the House the evidence the Senate possessed as to unlawful acts committed by a public officer, 'the bare communication is all that would be consistent with their duty. They would cautiously avoid to recommend or suggest an impeachment.'

But the Senate has not hesitated to prompt the attention of the House to cases which may deserve impeachment. Thus, March 25, 1924, by a vote of 71 to 0, the Senate adopted a resolution, the preamble of which recounted activities, which, if proved, would amount to subornation of perjury by Clarence C. Chase, a collector of customs. In accordance with the resolution — which Borah declared 'eminently proper' — the testimony adduced and a copy of this resolution were transmitted to the House 'for such proceedings against the said Clarence C. Chase as may be appropriate.' (*Cong. Rec.*, 4915–17.) How unbiased a jury would the Senate have proved if an impeachment had been brought before it? Chase resigned. The Secretary of the Treasury transmitted the letter of resignation to Senator T. J. Walsh (who had introduced the resolution), intimating that acceptance would be delayed if immediate acceptance would cause embarrassment to the Senate committee investigating the naval oil leases in connection with which Chase's offense was alleged to have been committed. Walsh acknowledged this courtesy; but in the Senate he declared: 'It is a well-established rule, as stated by the Senate, that the resignation of an offending officer does not in any measure whatever affect impeachment proceedings. The impeachment proceedings should go forward, whether he resigns or not.' (March 25, 1924, *ibid.*, 4916.) In the House the resolution and papers were referred to the Committee on the Judiciary (*ibid.*, 4992), which made no report.

the Senate and 'at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach' the officer accused. Hard upon the heels of the messenger follows the committee, confirming the notice of their appointment and requesting that the Senate take order for the defendant's appearance to answer to the said impeachment.

In nearly twoscore instances, impeachment proceedings, incited by various motives, have been started by the House.<sup>1</sup> But in only

<sup>1</sup> From 1791 to 1925 the number of impeachment proceedings in the House not resulting in trial was 37. (Hinds, *House Precedents*, III, secs. 981-1034.) The list was brought down to 1925 by the Legislative Reference Service of the Library of Congress. Included in the list are a Vice-President, an Attorney-General, two U.S. District Attorneys, four members of the Federal Reserve Board, a Collector of the Port of New York, the Consul-General to Dublin, the Consul-General and Vice-Consul to Shanghai, and 27 federal judges.

A week to a day after beginning his service in the House, William E. Barrett (editor of the *Boston Advertiser*) launched his congressional career thus: 'Mr. Speaker, — I do impeach Thomas F. Bayard, United States Ambassador to Great Britain . . . of high crimes and misdemeanors.' The basis of his charges was the London dispatch in that morning's paper, to the effect that Ambassador Bayard, the previous evening, in an address before the Edinburgh Philosophical Institute, had severely criticized the effects of high protective tariffs in the United States. That an Ambassador's making such a speech was a serious impropriety was not to be denied. No one believed that it was a substantial ground for impeachment, however, and the resolution to refer it to a committee was promptly rejected by a vote of 92 to 209. But Editor Barrett had captured 'front-page' publicity, and his shrewd part in the debate proved him a man to be reckoned with. Dec. 10, 1895, *Cong. Rec.*, 114-25.

Representative L. T. McFadden, who had bitterly denounced the Hoover moratorium, Dec. 13, 1932, 'impeached Herbert Hoover, President of the United States, for high crimes and misdemeanors,' setting forth nineteen charges. On motion of the Democratic floor leader his resolution was laid on the table by a vote of 361 to 8. *Ibid.*, 402.

Secretary Andrew W. Mellon was the favorite target for impeachment resolutions. (*Supra*, p. 821 ff.) While a House committee was investigating such a resolution's charges, Secretary Mellon was nominated for the post of Ambassador to the Court of St. James; the nomination was duly confirmed; and he resigned as Secretary of the Treasury. The committee, therefore, recommended that 'further consideration of the said charges' be hereby discontinued. Disappointed minority members acknowledged their belief that 'no useful purpose would be served by continuing the investigation,' and under 'previous question' discontinuance was agreed to. Feb. 13, 1932, *ibid.*, 3850.

Since the House is not a continuing body, it is highly doubtful whether by House action alone a committee of the House can be empowered to carry forward an impeachment inquiry after the expiration of the Congress in which it was chosen. In 1929, a joint resolution was passed by both House and Senate and approved by the President in order that authority by law might be given for such appointees of the House to hold hearings, summon witnesses, and determine upon the recommendation which should be made to the next House. See discussions of this problem, Feb. 19, 1929, and Feb. 21, *ibid.*, 3763 ff. Judge Francis A. Winslow, against whom this inquiry was directed, resigned before it had fairly started; and the House voted that no further proceedings be had.

In 1933, the movement to impeach Judge Louderback started so late that there was no possibility of its being carried to a conclusion before the expiration of the 72d Congress. In the debate preceding the naming of five managers, Feb. 27, it was acknowledged that a new choice would probably have to be made after the convening of the new House. This problem was discussed, March 22. In lieu of two managers who had not been returned in the 73d Congress, two Representatives were chosen to serve with the three previously named to carry forward the impeachment proceedings. *Ibid.*, 767-72.

twelve instances has the House reached the point where it was ready to exhibit particular articles of impeachment and to pledge itself to make good the same. The accompanying list of 'Senate Impeachment Trials' (page 878) presents the most essential facts as to these twelve trials.

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#### RULES GOVERNING THE TRIAL OF IMPEACHMENTS

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The procedure is regulated by a detailed series of rules developed by the Senate, under the authorization of the clause: 'Each house shall determine the rules of its proceedings.' The rules have not been revised since the trial of President Johnson, in 1868. At both the Swayne and the Archbald trials attention was called to the serious need of revision, but in each instance the Senate was too pressed for time to undertake that task. These rules, twenty-four in number, set forth the successive steps to be taken, prescribe the forms of subpoena and summons, and the form of the oath or affirmation to be taken by Senators and by witnesses.<sup>1</sup>

When the Senate is ready to open the trial, the presiding officer takes the oath, and then administers it to the Senators in the following form:

I solemnly swear [or affirm, as the case may be] that in all things appertaining to the trial of the impeachment of ..... now pending I will do impartial justice according to the Constitution and laws. So help me, God.<sup>2</sup>

The Sergeant-at-Arms then makes proclamation (as in 1868):

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence on penalty of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment against Andrew Johnson, President of the United States.

<sup>1</sup> Senate *Manual* (1933), 87-97.

<sup>2</sup> In the Belknap and Swayne trials, by invitation of the Senate the oath was administered to Senators by the Chief Justice of the Supreme Court.

The managers for the House thereupon take the places assigned them, and formally present the articles of impeachment, and the Sergeant-at-Arms makes proclamation thus:

Andrew Johnson, President of the United States! Andrew Johnson, President of the United States! appear and answer the articles of impeachment exhibited against you by the House of Representatives.

The accused may appear in person, and make answer, as did Judge Chase; or he may enter an appearance by counsel, as did President Johnson; or he may fail to appear either in person or by attorney. Thus, at the time of his impeachment, Judge Humphreys was serving as a judge of a 'district court of the Confederate States of America,' and naturally neither heard nor heeded the proclamation. In case of such default, the rules require that the trial nevertheless proceed as upon a plea of not guilty.

The accused's answer has usually called forth a replication by the House, after the filing of which the managers are given an opportunity to substantiate their charges. The witnesses are sworn, examined and cross-examined. In the Johnson trial, after heated debate, it was decided:

The presiding officer may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance, submit any such question to a vote of the members of the Senate.<sup>1</sup>

If a Senator wishes a question to be put to a witness, or if he wishes to offer a motion or order (except a motion to adjourn), it is reduced to writing and put by the presiding officer.<sup>2</sup> After the respondent's counsel have presented their defense, arguments are presented in number and order determined by vote of the Senate. When the time for decision has come, the presiding officer directs the Secretary to call the names of the Senators. Each Senator rises in his place, and the presiding officer proposes to him this question:

Mr. Senator [Blank], how say you? Is the respondent [Andrew Johnson, President of the United States], guilty or not guilty of a high crime or misdemeanor as charged in this article?<sup>3</sup>

<sup>1</sup> Rule VII, *Impeachments*.

<sup>2</sup> 'We had trouble in the Archibald impeachment case with Senators' rising and propounding questions, cross-fire questions. Finally we determined that the only practical way to proceed was to propound the questions in writing.' Ashurst, Feb. 3, 1933, *Cong. Rec.*, 3269.

<sup>3</sup> See p. 850 for modifications of this form.

## THE PRESIDING OFFICER AND HIS AUTHORITY

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'When the President of the United States is tried, the Chief Justice shall preside.' It would be obviously improper that the Vice-President should preside over a trial which might result in his own elevation to the Presidency.<sup>1</sup> The inference is that in all other cases an impeachment trial is to be presided over by the man who presides over the Senate in its ordinary session, i.e., in general, by the Vice-President. But, if that office is vacant, or if the Vice-President is not present, his place is taken usually by the President *pro tempore*. In the Swayne trial, which began only thirty-three working days before the end of the short session of Congress, because of impaired health and the inevitable pressure of ordinary business the President *pro tempore* requested 'that the Senate will select a Senator to preside over the proceedings while the Senate is a court, and that I be permitted to preside in the legislative and executive sessions.'<sup>2</sup> In compliance with this request, the Senate chose Senator Orville H. Platt of Connecticut, who served as 'the presiding officer' throughout the trial.

The rules make evident the intent that when the Senate is sitting for the trial of an impeachment, the presiding officer shall act as the agent or mouthpiece of the Senate and not as an independent authority. The Vice-President and the President *pro tempore* are accustomed to this position of restraint. But in the Johnson trial Chief Justice Chase, an outsider, presided. Furthermore, before the trial opened, he had sent to the Senate a formal communication protesting against the Senate's having formulated the rules to govern the trial

<sup>1</sup> Senator Charles Sumner believed that this provision was introduced 'because the framers of the Constitution contemplated the possibility of the suspension of the President from the exercise of his powers, in which event the Vice-President could not be in the chair of the Senate because he would be in the President's place.' (*De Witt, Trial of Andrew Johnson*, 391.) But in the Convention the proposal 'that persons impeached be suspended from their office until they be tried and acquitted' had been rejected by a vote of 8 to 3. (*Madison, Debates*, 561.) At the opening of the Louderback trial, Vice-President Garner called attention to the fact that he had been Speaker at the time the House had passed the impeachment resolution; but no objection was raised to his presiding at the trial.

<sup>2</sup> W. P. Frye, Jan. 24, 1905, *Cong. Rec.*, 1289.

and having permitted the presentation of the articles of impeachment before it had constituted itself as a court of impeachment by its members' taking the oath required. This dictatorial attitude was resented, and after the trial was formally opened, there at once was manifested a determination to put a curb on the Chief Justice's independence. Sumner introduced and urged the adoption of a resolution:

That the Chief Justice, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate, and has no authority under the Constitution to vote on any questions during the trial; he can pronounce decisions only as the organ of the Senate and with its consent.<sup>1</sup>

This proposal was defeated by a narrow margin — 22 to 26. But practically every decision volunteered by the Chief Justice as to points of order or the admission of evidence was challenged by an appeal to the Senate and a demand for the yeas and nays. Taught by bitter experience of being thus overruled, as the trial wore on, the Chief Justice came to submit most doubtful questions to the immediate determination of the Senate.

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#### IS THE SENATE A 'COURT' IN THE TRIAL OF IMPEACHMENT?

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To the layman the natural inference from the language of the Constitution is that in trying impeachments the Senate sits as a court. 'The Senate shall have the power to try all impeachments.' '*Judgment* in cases of impeachment shall not extend further...' 'On impeachment for and *conviction* of treason, . . .' 'Try,' 'judgment,' 'conviction' are terms associated distinctly with the judicial process.

There is no weight in the argument that the Senate was not intended to sit as a court in the trial of impeachments, inasmuch as the Constitution had declared in Article III: 'The judicial power of the United States shall be vested in one Supreme Court.' This section evidently refers to the ordinary judicial powers, and the failure here to

<sup>1</sup> March 31, 1868, *Cong. Globe*, 63, Supplement.

include mention of impeachment trials is no more an implication that in them the Senate does not sit 'as a court' than does the absence of reference in this section to courts martial imply that those bodies are not judicial.

The provision that in such trials the Senators 'shall be on oath or affirmation' was obviously intended to impress them with a more solemn sense of responsibility in trying the impeachment than might be felt by the Representatives who presented the charges.

As a matter of course the Senate assimilated its procedure in these trials to that of a court. In the first impeachment, Blount, the accused, was arrested and required to give bond. In the second impeachment,

The character of a court was taken in all forms of summons. The Secretary of the Senate signed and the Sergeant-at-Arms served the summons to Judge Pickering, while the witnesses were regularly subpoenaed by the Secretary 'to appear before the Senate of the United States in their capacity of a Court of Impeachments,' and the subpoenas were served by the marshals of the district courts.<sup>1</sup>

Moreover, in the Blount trial the Senate in the most formal fashion had characterized itself as a court, submitting its determination to vote in this form:

The court is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment.<sup>2</sup>

The occasions when the effort has been made to assert that in sitting for the trial of impeachments the Senate does not act 'as a court' have been those when a majority of the Senators have been intent on using the impeachment as a process for the removal of officers politically obnoxious, and when, therefore, they wished great latitude of construction of the grounds on which an impeachment might be based and greater freedom of action, especially as to the admission of evidence, than were to be had in a court of law.<sup>3</sup>

The political animus back of the Pickering impeachment was clear.

<sup>1</sup> Henry Adams, *History*, II, 153-54.

<sup>2</sup> Jan. 11, 1799.

<sup>3</sup> For example, a week after the ending of the trial of Andrew Johnson, Sumner introduced a series of resolutions intended to remove all doubts on this question, and declare the constitutional rights of the people in cases of impeachment. One paragraph asserted: 'The Senate, on an impeachment, does not exercise any portion of the judicial power, but another and different power, exclusively delegated to the Senate, having for its sole object removal from office and disqualification therefor.' June 3, 1868, *Works*, XII, 411-13.

The aged judge was obviously unfit to perform the duties of his high office: he was a confirmed drunkard, and at the time of his trial was hopelessly insane. Already under provision of the Judiciary Act of 1801 the Circuit Court had appointed one of its own members to fill the place of Pickering in his disability, and this same arrangement might have been continued in 1802. 'But a fine chance to turn out a Federalist would thus be lost, and Jefferson determined to get rid of Pickering by impeachment.'<sup>1</sup>

At the opening of the trial the respondent appeared neither in person nor by counsel. The 'court' granted his son's petition, and in the absence of and against the protest of the managers received depositions in evidence of insanity. Later, the managers presented the testimony of the prosecution and then withdrew. Says Henry Adams:

The Senate found itself face to face with an issue beyond measure delicate, which had never been discussed, but from which escape was impossible. Acquittal of Pickering would probably be fatal to the impeachment of Chase, and would also proclaim that the people could not protect themselves from misbehaviour in their judicial servants. On the other hand, conviction would violate the deep principle of law and justice that an insane man was not responsible for his actions and not amenable to any earthly tribunal.<sup>2</sup>

To meet this dilemma and relieve uneasy consciences, Anderson moved that the form of question on which the Senate should take a yea-and-nay vote be not 'Is the respondent guilty of a high crime or misdemeanor as charged in the . . . Article?' but 'Is the respondent guilty as charged in the Article of Impeachment?' This motion was passed by a two-to-one majority, only the nine Federalists opposing it, and presently, by a vote of 19 to 7, on each of the four articles the respondent was declared 'guilty as charged.' Two of the Federalist Senators refused to vote, on the ground that the proceedings were irregular; three others registered their protest by absenting themselves.

Out of a Senate of 34 members only 26 voted, and only 19 voted for conviction. So confused, contradictory and irregular were these proceedings that Pickering's trial was never considered a sound precedent. That an insane man could be legally guilty of crime on *ex parte* evidence, without a hearing, without even an attorney to act in his behalf, seemed such a perversion of justice that the precedent fell dead on the spot.<sup>3</sup>

On the very same afternoon this verdict was declared, the House voted to impeach Samuel Chase, a Federalist Justice of the Supreme

<sup>1</sup> John B. McMaster, *History*, III, 166.

<sup>2</sup> *History*, II, 156.

<sup>3</sup> *Ibid.*, 158.

Court. In the rules reported to govern the conduct of the trial occurred the phrases, 'in open court' and 'this court.' Senator Giles persuaded the Senate to strike out those phrases, on the ground

that the Senate, sitting for the trial of an impeachment, is not a court. . . . His motive for this antipathy to the term court is that the Senate . . . may be absolved from all the rules and principles which restrain and bind down courts of justice to the practise of justice.<sup>1</sup>

In a long address to the Senate, Giles himself, however, assigned a different reason. He declared:

Impeachment was nothing more than an enquiry, by the two Houses of Congress, whether the office of any public man might not be better filled by another. . . . Impeachment was not a criminal prosecution; it was no prosecution at all. . . . A trial and removal of a judge upon impeachment need not imply any criminality or corruption in him.<sup>2</sup>

Henry Adams declared that in this case

the Senate became confused and never knew on what theory it acted. . . . Though calling itself a court of justice, it would not follow strict rules of law. The result was a nondescript court, neither legal nor political, making law and voting misdemeanors for itself as it went, and stumbling from one inconsistency to another.<sup>3</sup>

Everyone recognized that if the impeachment of Chase resulted in his removal, this trial would be but the curtain-raiser to the trial of Chief Justice Marshall, whose recent decision in *Marbury v. Madison* had greatly affronted Jefferson. 'Throughout the trial, Randolph (leader of the managers for the House) and [Senator] Giles were in frequent conference — judge and prosecutor working together for the success of the party plan.'<sup>4</sup> Yet despite the tense partisan feeling, the Republicans were unable to muster the necessary votes to effect Chase's removal. The managers' stand on the nature of impeachment proceeding was too confused, the charges too trivial, and the precedent

<sup>1</sup> So said John Quincy Adams, *Memoirs*, I, 324.

<sup>2</sup> *Ibid.*, 321.

<sup>3</sup> *History II*, 223–24. See *Annals of Congress*, XIV, 71–675; preliminary action in the House, *ibid.*, 726–63.

William Plumer (*Memorandum*) records many points of interest from the standpoint of a Senator. See also the account of the trial in A. J. Beveridge's *Life of John Marshall*; and *John Randolph of Roanoke*, by W. C. Bruce, who 'entertains no doubt that Chase richly deserved conviction' (p. 205).

<sup>4</sup> J. Q. Adams, *Memoirs*, I, 353.

which would be set by such a partisan attack on the judiciary too menacing. The Republicans numbered twenty-five out of a Senate of thirty-four members, yet the highest vote recorded for conviction on any one of the eight articles was nineteen.<sup>1</sup>

More than threescore years passed before there was again brought into controversy the question whether in trying impeachments the Senate sits as a court. And again the real issue was one of partisan politics. Again a Senator (Conkling) who had helped draft 'Rules of Procedure and Practice in the Senate When Sitting as a High Court of Impeachment' now moved to amend by striking out the word 'Court' in the title and in various other places where it occurred.

There was extended debate as to the use of the word 'court' in connection with previous trials, Conkling insisting that the word had been 'used rather by the Secretary in recording the proceedings than by the Senate itself.' But Senator Edmunds called attention to the formal resolution in the Blount trial, wherein the Senate had called itself a 'court of impeachment.'<sup>2</sup> By a vote of 16 to 13 Conkling's motion was adopted. The outcome of the debate was that the Senate decided that 'it sat as a "constitutional tribunal," convened "to inquire into and determine whether Andrew Johnson, because of mal-

<sup>1</sup> 'Chagrin, anger, humiliation raged in Randolph's heart. His long legs could not stride as fast as his frenzy, when, rushing from the scene of defeat, he flew to the floor of the House. There he offered an amendment to the Constitution providing that the President might remove national judges on the joint address of both Houses of Congress.... Nicholson quickly followed with a proposal so to amend the Constitution that state legislatures might at will recall Senators.' A. J. Beveridge, *John Marshall*, III, 220-21; *Annals of Congress*, XIV, 1212-14.

December 20, 1937, Attorney-General Cummings gave to the press, on the eve of its delivery to Hatton W. Sumners, Chairman of the House Committee on the Judiciary, a long letter declaring that the conduct of Judge Ferdinand Geiger (U.S. District Court, Eastern District of Wisconsin) was 'so obstructive of justice that I could not justify a failure to bring it to your knowledge.' Though this letter did not mention impeachment, its intent was obvious, since it was addressed to the chairman of the committee where impeachment proceedings originate. The Attorney-General declared that Judge Geiger's 'arbitrary, unjust, and unfair conduct' and his 'unwarranted interference with this Department and the Grand Jury' had obstructed and discredited the efforts of the Government to 'correct the abuses in the [automobile] industry.'

At this writing (September 1, 1938) no action by Chairman Sumners has been reported. Waiving, therefore, without prejudice all question of the judge's guilt or innocence of the serious charges, the point of greatest present significance is the new precedent in procedure. For the first time, when a federal judge makes rulings or decisions in opposition to what the Administration wants, by the Attorney-General there is given to the press and then delivered to the Chairman of the House Committee on the Judiciary a severe arraignment of the offending judge, obviously with the intent to incite the bringing of impeachment charges against him. If notice is thus to be served on federal judges, in case their interpretations of law do not square with those of the Executive, the impairment of the independence of the judiciary cannot fail to be rapid and calamitous.

<sup>2</sup> Hinds, *House Precedents*, III, secs. 379, 381.

versation in office, is longer fit to retain the office of President, or hereafter to hold any office of honor or profit.''<sup>1</sup>

Yet the committee of which Conkling was a member, and which was charged by his motion to eliminate reference to a 'court,' 'left in Rule XXIV the words "all process shall be served by the Sergeant-at-Arms of the Senate, unless otherwise ordered by the court," and these words appear in that rule to this day, as a mute admission that, call it what you will, the Senate is a "court" when sitting for the trial of an impeachment.'<sup>2</sup> In the Johnson trial, Senators repeatedly referred to that body as a 'court,' even Sumner using the word, although he had vehemently argued to the contrary. In every subsequent trial the Senate has been called a 'court,' being so designated in the Archbald trial 'at least one hundred and six times.'<sup>3</sup>

#### CONTRASTS BETWEEN THIS 'COURT OF IMPEACHMENT' AND A COURT OF LAW

There are outstanding differences between this 'constitutional tribunal' and the ordinary court of law. In the latter the accused has a right to challenge jurors who are to pass upon his guilt. But in an impeachment trial no right exists to challenge a Senator for any cause. In the Johnson trial, 'Bluff Ben Wade' was sworn in as one of the 'court,' taking the oath: 'In all things appertaining to the trial of Andrew Johnson . . . I will do impartial justice according to the Constitution and the law. So help me, God!' Under the law as it then stood, he himself, as the Senate's President *pro tempore*, would succeed to the Presidency if Johnson should be convicted. At the beginning of the trial the bets were running high that within thirty days at the most he would be sitting in the President's chair. His vote, 'Guilty,' on every article submitted was a foregone conclusion. On the other hand, the accused President's son-in-law, Senator David T. Patterson, had also been sworn in as a member of this peculiar 'court.'<sup>4</sup>

<sup>1</sup> It is not possible to state how many of the sixteen so voted because they thought the words were superfluous, as Senator Conkling argued, how many so voted because they agreed with Senator Morton . . . that their retention might "lead to consequences that we do not desire, and to difficulties," or how many so voted because they did not consider that the Senate would be sitting as a court. Alexander Simpson, Jr., *A Treatise on Federal Impeachments*, 23.

<sup>2</sup> De A. S. Alexander, *History and Procedure of the House of Representatives*, 336; *Report of Trial*, 30.

<sup>3</sup> Alexander Simpson, Jr., *Federal Impeachments*, 25.

<sup>4</sup> At the convening of the Senate for the trial of Judge Louderback, before the oath was administered to all the Senators at once in their places, both Borah and Johnson

At the very end of the Johnson trial attention was directed to another anomaly. After the vote, 35 to 19, had been taken on Article XI, the Senate — on motion of Senator Williams, ‘the mouthpiece of the caucus which the senatorial court had deemed it decorous to hold’<sup>1</sup> adjourned for ten days before voting upon the other articles. During that interval it was proposed in the legislative session of the Senate to take up the Arkansas Bill. When the question was raised whether Senators from the ‘reconstructed’ state, if they were admitted to the floor, could become members of the court of impeachment, Sumner replied: ‘Of course they can be.’ Fessenden dissented, but Dixon insisted:

There are Senators in this body, able and distinguished men and lawyers, who think that if the Arkansas gentlemen are admitted as Senators of the United States, there is no power here to refuse them the oath; and moreover, there are some Senators who believe they would be compelled to act.

Fortunately the Senate’s refusal to take up the Arkansas Bill prevented the perpetration of such a travesty of justice.<sup>2</sup>

A Senator in an impeachment trial may figure both as a witness and as a judge. In the Pickering trial (March 9, 1804), ‘at the instance of the court, Simon Olcott and William Plumer, Senators, were respectively sworn and affirmed, and were interrogated by the court and the

asked permission to stand aside in this trial because of personal relations to the case which in their opinion made their participation in the trial unfitting. Ashurst, Chairman of the Committee on the Judiciary, commented: ‘There is no such thing as an impeachment juror or Senator escaping from his responsibility to compose the Court. Indeed, in the Andrew Johnson impeachment case, Senator Ben F. Wade, then the President *pro tempore*, who would have become President had the impeachment succeeded, was asked to stand aside, but it was determined that there was no way by which Senator Wade could be disqualified and thus made to stand aside. But I am sure if a Senator should declare that he is disqualified, he could not and should not be required to hear evidence or to render a verdict.’ (*Cong. Rec.*, 47, March 9, 1933.) By unanimous consent, Borah and Johnson were permitted to stand aside in this trial. Later, after the impeachment oath had been taken, Senators Overton and Loughran requested to be excused from participating in this trial on the ground that they had been members of the House at the time when the impeachment of Judge Louderback was voted, and the request was granted.

When it came to the voting upon the several charges, the Vice-President ruled that ‘a Senator can ask to be excused from voting on any article at any time. He need not make the request in advance of the reading of the first article.’ For acceptable reasons, several Senators were excused from voting, May 24, 1933.

<sup>1</sup> David M. De Witt, *The Impeachment of Andrew Johnson*, 550.

<sup>2</sup> The question, at what stage in an impeachment a man must have joined the ‘court’ in order to take part in its decision, was not new. In his opening speech in the Johnson trial, Manager Butler pointed out that of the more than 170 peers who commenced the trial of Warren Hastings only 29 sat and pronounced the verdict at the close; and during the trial, by death, succession, and creation, there had been more than 180 changes in the House of Lords.

managers on the part of the House of Representatives.' The next day both of these Senator-witnesses as Senator-judges gave their votes, 'Not guilty,' on each of the four articles.<sup>1</sup>

Should a Senator show judicial restraint when an impeachment trial is in prospect? For many weeks before the actual launching of the impeachment against President Johnson, it was a practical certainty that he would soon be brought to trial. In opposing a motion to adjourn, Sumner characterized Johnson's recent message as an 'appeal which was calculated to revive the dying rebellion,' and declared 'its author must be removed from the executive chair, or Congress must continue in permanent session to watch and counteract him.' He denounced 'that evildoer, the President,' and characterized him as 'the successor of Jefferson Davis in the presidential chair.' Senator Sherman remarked:

It does seem to me a very strange thing that a judge, by whose vote alone the President can be removed should declare he must be removed.... Shall we, the judges, ... decide beforehand that the President ought to be removed?

Senator Buckalew joined in direct rebuke:

Out of respect to our political institutions and the Constitution of the country under which we assemble and to the reasonable and just opinions of the American people, we should withhold ourselves from the expression of judgment upon a question which is not here, and which cannot come here unless it be brought here by the House of Representatives over whose action we have no control.<sup>2</sup>

<sup>1</sup> S. Doc., *Cases of Impeachment*, 32-33.

<sup>2</sup> See resolution introduced by Sumner, July 20, 1867, setting forth his view that debate should be unlimited until Senators took the special oath at the opening of an impeachment trial. (*Cong. Globe*, 752.) In a speech on the 'expunging resolution,' Jan. 16, 1837, James Buchanan had discussed this very embarrassment which arose more than thirty years later: 'Above all, we should be most cautious in guarding our judicial character from suspicion.... We should never voluntarily perform any act which might prejudice our judgment or render us suspected as a judicial tribunal. More especially, when the President of the United States is arraigned at the bar of public opinion for offenses which might subject him to an impeachment, we should remain not only chaste but unsuspected.' Raising the question in what position the Senate would have found itself, if, after it had passed the resolution condemning the President, in the next Congress the House, changed in personnel by the election, had brought impeachment charges against the President, he continued: 'They had already prejudged the case. They had already convicted the President and denounced him to the world as a violator of the Constitution.... The Senate had rendered itself wholly incompetent in this case to perform its highest judicial functions. The trial of the President, had articles of impeachment been preferred against him, would have been a solemn mockery of justice.' (*Works*, III, 181.) This same question of propriety if not of legal right was repeatedly raised in the early months of 1924, when Senators, day after day, were demanding the removal of the Secretary of the Navy, the Assistant Secretary, and the Attorney-General — any one of whom might presently be brought

To these criticisms Sumner rejoined:

Unquestionably it belongs to the other House to initiate proceedings which shall set the President at your bar. But until then, it is the right and the duty of every Senator to express himself freely with regard to his conduct; nor can there be any limit to this latitude. It is as broad as human thought. No future duty can be a strait-jacket now.<sup>1</sup> . . . If he is President, we must remain at our posts precisely as Grant remained before Richmond.

In this openness of mind did the Senator from Massachusetts take oath to do impartial justice according to the Constitution and the laws in all things appertaining to the trial of Andrew Johnson, President of the United States!

Not only is the relation of the Senator to his fellow-members of the 'high court of impeachment' unique, but his relations to the public are very different from those of a judge or juror in a court of law. Outsiders are under no restraint in attempting to influence the opinion and decision of this 'court' and of its individual members, as is indicated by abundant illustrations from the exciting days of the Johnson trial. Thus, the seven Republican members of the House of Representatives from Missouri signed a formal request to Senator Henderson to 'withhold your vote on any article upon which you cannot vote affirmatively.'<sup>2</sup> A 'Union Congressional Committee,' made up of Republican members from both branches of Congress, instigated systematic pressure from home upon every doubtful Senator. In response to a circular telegram from the chairman of this committee, a flood of resolutions, letters, telegrams, and even delegations demanding the President's conviction came pouring in from many states upon the 'recusant' Senators. 'Strike the usurper from his seat!' was the telegram from Holden, the first of Andrew Johnson's provisional governors. The general conference of the Methodist Episcopal Church appointed an hour of prayer 'to beseech Him to arouse Senators from error, and to influence them that their decisions shall be in truth and righteousness.' The context left no doubt as to the decision which they desired the Almighty to 'negotiate'! The Kansas Senators received a telegram (May 14, 1868): 'Kansas has heard the evidence and de-

to trial before the Senate on impeachment charges. 'If the House had brought Attorney-General Daugherty to trial before the Senate in 1924, there would not have been left a quorum of Senators competent to try the case, so many had already involved themselves' in his condemnation or defense.

<sup>1</sup> De Witt, *op. cit.*, 229-30.

<sup>2</sup> May 12, 1868, *ibid.*, 526.

mands the conviction of the President'! signed by 'D. R. Anthony and 1000 others.' In reply to Senator Ross's telegram —

I do not recognize your right to demand that I vote either for or against conviction. I have taken an oath to do impartial justice... and I trust I shall have courage and honesty to vote according to the dictates of my judgment and for the highest good of my country —

he received the message:

Your vote is dictated by Tom Ewing, not by your oath. Your motives are Indian contracts and greenbacks. Kansas repudiates you as she does all perjurors and skunks.<sup>1</sup>

In his long and lurid 'opinion,'<sup>2</sup> Sumner declared:

This is a political proceeding, which the people at this moment are as competent to decide as the Senate. They are the multitudinous jury; for, on this impeachment, involving the public safety, the vicinage is the whole country.

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#### WHAT OFFENSES ARE IMPEACHABLE?

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The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

In the trials before the Senate this question has been closely associated with that of the nature of the Senate's procedure when sitting 'for the trial of impeachments.' Extreme liberals have emphasized the point that the above statement in the Constitution occurs, not as a formal enumeration of grounds of impeachment, but as incidental to the statement of the particular offenses conviction of which shall lead to the removal of certain officers from their positions. The general consensus of opinion, however, is that those phrases do comprise the basis of all impeachment charges which the Senate will entertain. Of these, 'treason' is a term to which the framers of the Constitution wisely gave a precise and restricted definition. 'Bribery' is an offense

<sup>1</sup> De Witt, *op. cit.*, 545. He cites Ross's speech in self-vindication, *Cong. Globe*, 40th Cong., 2d sess., 4513. Compare Pomeroy's testimony before managers, quoted in the same speech.

<sup>2</sup> It fills ninety-two pages in his *Works*, XII, 318-410.

as to the nature of which controversy is impossible. In practically every impeachment trial, therefore, the Senate has been answering the question, Do the alleged offenses fall within the Constitution's meaning in the phrase, 'other high crimes and misdemeanors'? Furthermore, 'high crimes' obviously imply offenses against positive law. Hence the real controversy, especially in 'political' impeachments like those of Pickering, Chase, and Johnson, has hinged on the Senate's definition of 'misdemeanors.' On this point the Senate must be the sole judge. There is no appeal from their interpretation of the term.

In the Chase trial, Hopkinson, one of the respondent's counsel, declared:

A misdemeanor or a crime is an act committed or omitted, in violation of a public law either forbidding or commanding it. By this test, let the respondent... stand justified or condemned....

On the other hand, Randolph, leader of the managers of the House, denounced

the monstrous pretension that an act to be impeachable must be indictable. Where? In the Federal Courts? There not even robbery and murder are indictable.... It is indictable nowhere for him to omit to do his duty, to refuse to hold a court. But who can doubt that both are impeachable offenses and ought to subject the defendant to removal from office?

At the opening of the Johnson trial, Manager Butler was at great pains to define an impeachable crime or misdemeanor in a way to cover the offenses alleged in the articles.

We define an impeachable high crime or misdemeanor to be one in its nature or consequence subversive of some fundamental or essential principle of government or highly prejudicial to the public interest; and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted; or, without violating a positive law, by the abuse of discretionary power from improper motives or for any improper purpose.<sup>1</sup>

Similar views have been recently expressed. In the debate upon the resolution calling for the removal of the Secretary of the Navy, Denby:

Borah: We may impeach for any act or conduct subversive of the public interest.

<sup>1</sup> Blaine (*Twenty Years of Congress*, II, 380) commented: 'There has not been an occupant of the Executive Chair since the organization of the government, who did not at some period in his career commit an act which in the opinion of his political opponents was "highly prejudicial to the public interest."'

Jones (Washington): If the House does not see fit to prefer charges of impeachment, must we remain speechless?

Borah: Perhaps not speechless; that is too much to expect of the Senate!

Stanley: Does the Senator maintain that impeachment would lie for a simple misfeasance in office resulting from a total lack of knowledge of what might be going on or attention to the officer's duties free from any character of or suspicion of moral obliquity?

Borah: I think the impeachment process will get out of office any man that this body thinks ought not to be there. It rests, at last, upon our consciences, and our judgment as to whether the officer's conduct has been against the public interest.<sup>1</sup>

Sumner carried to the extreme the 'partisan's' strained interpretation of the phrase.

It is very wrong to try this impeachment merely on the articles. It is unpardonable to higgle over words and phrases where for more than two years the tyrannical pretensions of this offender... have been manifest in their terrible, heartrending consequences.... Show me an act of evil example or influence committed by a President and I show you an impeachable offense. [He insisted that the Senate in trying the case was not to be confined by the rigid rules of the common law.] It has rules of its own, unknown to ordinary courts.<sup>2</sup>

Madison had clearly ranged himself with those who held that other than indictable offenses were impeachable. 'I contend that the wanton removal of meritorious officers would subject him [the President] to impeachment and removal from his own high trust.' In the Virginia Convention he declared that if the President 'got up' a treaty 'with surprise,' he would be impeached, and insisted that 'incapacity, negligence, or perfidy of the Chief Magistrate' ought to be a ground for impeachment.<sup>3</sup>

Some of the most powerful expositions of the strict construction of the phrases in question are found in the arguments of Luther Martin in the Chase trial, and of Benjamin R. Curtis, one of the counsel for the respondent in the Johnson trial. Said Curtis:

'Other high crimes and misdemeanors.' *Noscitur a sociis*. High crimes and misdemeanors; so high that they belong in this company with treason and bribery. That is plain on the face of the Constitution, in the very first step it takes on the subject of impeachment. 'High crimes and mis-

<sup>1</sup> Feb. 8, 1924, *Cong. Rec.*, 2074.

<sup>2</sup> De Witt, *op. cit.*, 582; Sumner, *Works*, XII, 332.

<sup>3</sup> Elliot, *Debates* (2d ed.), III, 500, 516.

demeanors' against what law? There can be no crime, there can be no misdemeanor without a law written or unwritten, express or implied. There must be some law, otherwise there can be no crime. My interpretation of it is that the language, 'high crimes and misdemeanors,' means offenses against the laws of the United States.<sup>1</sup>

In the twelve trials, the articles of impeachment as presented by the House in every impeachment except those of Blount and Belknap included other than indictable offenses.<sup>2</sup>

Despite the fact that Senate majorities have voted 'guilty,' and conviction has been decreed where the offenses have been unindictable, the record of these trials makes it clear that the offenses must be substantial or, as has been said, 'have the characteristics of a crime.' Thus, in the Chase trial, conduct unfair and unbecoming in a judge was proved, but the Senate was not to be persuaded that the 'want of decorum' on the part of a judge was to be made the basis of an action which involved a partisan attack upon the whole national judiciary.<sup>3</sup> In the Johnson trial the bitterness was most rancorous. Yet the seven 'recalcitrant Republicans' in the Senate persisted in their determination that the trial should be a judicial proceeding, and that 'high crimes and misdemeanors' must be proved. The tenth article charged the President with bringing his high office into contempt by his speeches during his 'swinging 'round the circle' in 1866, when he had repeatedly assailed Congress in contemptuous terms. This article did not come to a vote, but it is significant that of the twenty-two Senators who filed opinions, seventeen declared that the offense charged did not amount to official misconduct.<sup>4</sup> Senator Perry, who voted 'Guilty' on the other articles, characterized these speeches as 'vain, foolish, vulgar, and unbecoming,' but he added: 'The Constitution does not provide that a President may be impeached for these qualities.' Senator Trumbull, one of the 'recusants,' wrote:

If the question was, 'Is Andrew Johnson a fit person for President?' I should answer, 'No!' His speeches and the general course of his administration are as distasteful to me as to anyone. But to convict or to depose a Chief Magistrate when guilt is not made palpable by the

<sup>1</sup> *Trial of Andrew Johnson.* Published by order of the Senate, 1868, I, 409.

<sup>2</sup> 'In the impeachments of Chase, Peck, Johnson, and Swayne, a majority of the Senate, though not two-thirds thereof, declared the respondents guilty of offenses not indictable.' Simpson, *Federal Impeachments*, 42-43.

<sup>3</sup> A. J. Beveridge, *John Marshall*, III, 203-04, citing Luther Martin's sarcastic reference to the managers' charge that Judge Chase's 'bows' had been offensive.

<sup>4</sup> Alexander, *op. cit.*, 451.

record would be fraught with far greater harm to the future of the country than can arise from having him in office.

Boutwell, one of the most determined of the House managers, years later acknowledged that 'the action of the House of Representatives in trying to impeach Andrew Johnson was an error.' Nevertheless, he declared his own belief that 'the vote of the House and the vote of the Senate, by which the doctrine was established that a civil officer is liable to impeachment for misdemeanors in office, is a gain to the public that is full compensation for the undertaking.'<sup>1</sup>

There is little doubt that Judge Swayne was guilty of some of the offenses charged against him.<sup>2</sup> Yet the Senate refused to convict him, apparently because its members did not believe that his peccadilloes amounted to impeachable 'high crimes and misdemeanors.'<sup>3</sup>

Judge Archbald was tried and convicted on five of thirteen articles, 'not one of which charged an indictable offense.'<sup>4</sup> The chairman of the managers summed up the result of the trial by declaring that the Senate had 'adopted a code of judicial ethics for the first time in American history.' Simpson thinks that the result would be better expressed by saying that it 'determined that a judge ought not only to be impartial, but he ought so to demean himself, both in and out of

<sup>1</sup> George S. Boutwell, *Reminiscences of Sixty Years in Public Affairs*, II, 96-124.

<sup>2</sup> Obtaining money from the United States under false pretenses; using without compensation the property of a railway which was in the hands of a receiver appointed by himself; not living in his district as required by law; and unlawfully fining for contempt of court.

In the trial of Judge Ritter (1936) the defense claimed that he had been guilty of no crime or misdemeanor on the bench, and had proved himself without blame except for having exercised 'poor judgment.' The principal alleged impropriety was his award (in a receivership) of a fee of \$75,000 to a group of attorneys, paid through Ritter's former law partner, from whom he at once accepted \$5000 in payment of a partnership debt. On that first charge he escaped conviction by but one vote of the requisite two-thirds. A peculiar feature of this Ritter decision was that, although the Senate voted 'Not guilty' on each of the first six charges, on the seventh article — a combination article which combined all the previous six, and charged that the actions complained of had 'brought his court into scandal and disrepute' — by a vote of precisely two-thirds he was declared 'Guilty.' (See debate on the decision, and protest by Senator Austin, *Cong. Rec.*, April 17, 1936.) He was automatically removed from office — but refused to recognize that fact! In the United States Court of Claims he brought suit for the continuance of his salary, arguing that 'the Court of Impeachment was without power to render a judgment upon the seventh article' which was a combination of the same charges on which he had been acquitted by separate judgments. The Court of Claims ruled against him. He took the case on appeal to the Supreme Court, which refused to pass upon the judgment of the Court of Claims (March 3, 1937).

<sup>3</sup> It has been suggested that in the Swayne case the proper procedure would have been by a demurrer to raise the question whether offenses, if proved, would constitute impeachable high crimes and misdemeanors. This might have saved much time (p. 879).

<sup>4</sup> Simpson, *Federal Impeachments*, 41.

court, that litigants will have no reason to suspect his impartiality; and that repeatedly failing in that respect constituted a "high misdemeanor" in regard to his office.'

#### WHO ARE SUBJECT TO IMPEACHMENT?

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. (Constitution, art. II, sec. 4.)

It is to be noted that in this section of the Constitution there is not set forth a positive enumeration of those who are subject to impeachment, but only of those officials whose removal and possible disqualification follow their conviction on impeachment charges.

Under the law of England 'all the King's subjects had been impeachable, whether in office or not, even if they had never held office.'<sup>1</sup> In the Blount trial, Manager Bayard asserted that even private citizens of the United States were impeachable, and Jefferson seems to have been strongly impressed by his supporting argument. Madison, however, wrote to Jefferson:

The universality of the impeachment power is the most extravagant novelty that has been broached. . . . No one seems to have maintained this view since Bayard. It is now generally conceded that only officials are subject to impeachment.

Accepting, then, the phrases above-quoted as a virtual listing of those whom the framers of the Constitution intended to subject to impeachment, the only doubt relates to who are included under 'all civil officers of the United States.' Those who have actually been presented for impeachment are as follows: President Johnson; a former Senator of the United States; a former Secretary of War; and nine federal judges.

Are members of either the House or the Senate impeachable? The strange course pursued in the preliminaries to the first impeachment trial prevented the Senate's giving a clear pronouncement on this question.

July 3, 1797, President Adams sent to both branches of Congress a special message calling attention to a letter signed 'William Blount,' which seemed to indicate that a Senator of that name from Tennessee was guilty of a serious crime. Before taking this action, Adams had

<sup>1</sup> D. Y. Thomas, *American Political Science Review*, II, 378.

sought the opinions of the Attorney-General, Mr. Rawle, and Mr. Lewis, upon certain questions. They had replied:

1. That the letter was evidence of a crime.
2. That the crime was of the denomination of misdemeanor.
3. That William Blount, being a Senator, was liable to impeachment for the said crime before the Senate.

In both branches of Congress special committees were appointed to consider the matter thus put before them by the President. In the House spirited debate arose as to whether a Senator was an impeachable officer. The chairman of its committee declared himself 'unable to see why the members of the Senate were not as fair objects of impeachment as any other officers of the government.' Nicholas and Gallatin took the opposite view; but Dana presented the arguments in favor of impeachability so effectively that Gallatin acknowledged that a part of his doubts had been removed. In accordance with its committee's recommendations, the House ordered that the chairman of its committee

do go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, impeach William Blount, a Senator of the United States, of high crimes and misdemeanors, and acquaint the Senate that this House will, in due time, exhibit particular articles against him and make good the same;

and that he

do demand that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for the appearance of the said William Blount, to answer to the said impeachment.<sup>1</sup>

Meantime, the Senate had instituted proceedings of its own upon the President's message. Its committee had reported in favor of Blount's expulsion. He had been ordered to present himself in the

<sup>1</sup> House Journal (July 6, 7), 130–33. Some members thought that in passing the first of the above orders the House was going far enough and that they should leave it to the Senate to act as they thought proper as to displacing their member from his seat. It was suggested that the word 'suspended' might be better used than 'sequestered.' The chairman replied that the words were synonymous. 'He had used "sequestered" because he found the word used in the books.' July 7, 1797, *Annals of Congress*, 461.

Immediately after the adoption of these two orders, the Speaker read a note from a member of the Senate, informing him 'that seats were prepared for the reception of the members of that House, in case they chose to attend the business then before the Senate (which was the question for expelling Mr. Blount from his seat, opposed by the counsel of Mr. Blount, viz: Messrs. Dallas and Ingersoll).' The House forthwith adjourned, 'and attended the Senate.' *Ibid.*, 462.

It is to be noted that this procedure of accusation — including the House request that the accused be 'sequestered from his seat' — is in precise conformity with English Parliamentary practice, as summarized by Jefferson. *Manual*, sec. LIII (ed. of 1923), 308.

Senate and to answer to the charges against him; and had been granted leave to be heard by counsel, not exceeding two in number and acceptable to the Senate. At the appointed hour, July 7, his counsel appeared. To the question whether he was the author of the incriminating letter, Blount declined to answer. The Senate was considering the request of Blount's counsel for the allowance of more time for the preparation of their case, when it was agreed that the question before the Senate be postponed for the purpose of receiving a special message from the House. The Representatives took the seats which had been prepared for them, and Chairman Sitgreaves presented the two orders which the House had passed. Forthwith the Senate passed a resolution that Blount be taken into the custody of its messenger, until he should enter into recognizance, with sureties, 'to appear and answer such articles as may be exhibited against him.' Without further delay, the Senate with only one dissenting vote then adopted the report of its own committee:

That William Blount, Esq., one of the Senators of the United States, having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator, be, and he hereby is, expelled from the Senate of the United States.<sup>1</sup>

Thus, 'in the same breath,' the Senate took measures to assure Blount's presence for trial on impeachment charges, and, asserting his guilt, expelled him from its membership!<sup>2</sup> Not until seventeen months later, a week after the opening of the third session of the Fifth Congress, were formal articles of impeachment presented. Blount's counsel at once denied the right of the Senate to take jurisdiction, on the ground that Senators were not 'civil officers of the United States' and that Blount, having been expelled from the Senate before the impeachment was actually instituted, was at that time a private citizen. The trial came to a speedy end. A resolution declaring that Blount was an officer and impeachable was negative by a vote of 11 to 14. The final motion was then passed in the following form:

The court are of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and the said impeachment be dismissed. (Yea, 14; nays, 11.)<sup>3</sup>

<sup>1</sup> *Annals of Congress*, 38-40, July 7, 1797.

<sup>2</sup> Three days later, July 10, Congress adjourned, 'William Blount failing making his appearance this day, agreeably to the recognizance entered into on the 8th inst.' *Ibid.*, 45.

<sup>3</sup> *Annals of Congress*, 2319, Feb. 11, 1799.

The answer is thus inconclusive, since the Senate did not make clear whether its denial of jurisdiction was due to its belief (1) that no Senator was liable to impeachment or (2) that a man who had ceased to hold 'a civil office' under the United States was no longer impeachable. Says Wharton:

In a legal point of view, all that this case decides is that a Senator of the United States, who has been expelled from his seat, is not after such expulsion subject to impeachment.<sup>1</sup>

Future attempts to impeach members of the House or of the Senate are likely to be prevented not so much by the citation of this dubious precedent, nor by the labored argument to the effect that these are officers, not of the United States, but of the individual states or of the people,<sup>2</sup> as by the fact that there is always available to each branch of Congress the power to censure or expel any of its own members — a power not awaiting the initiation or co-operation of the other branch (which might arouse resentment) and a power which in its exercise does not involve the delays and formalities — however salutary — of a 'trial' by the Senate on formal accusation by the House of 'treason, bribery, or other high crimes and misdemeanors.'

In the Belknap case the question when an officer ceases to be impeachable was blurred by a different complication. William W. Belknap, Secretary of War, was under investigation by a committee of

<sup>1</sup> *State Trials*, 317, n. It has been urged that where the word 'officers' is elsewhere used in the Constitution, the context excludes Senators and Representatives. Yet Hamilton (*Federalist*, No. 66) argued that Senators would not hesitate to convict on impeachment charges members of their own body. In the ratifying conventions three others, who had been among the most influential members of the Federal Convention, explicitly declared that Senators were impeachable: Randolph: 'They [Senators] may also be impeached.' (*Elliot, Debates*, III, 202.) Mason: 'The House of Representatives were to impeach them; the Senators were to try themselves.' (*Ibid.*, 402.) C. C. Pinckney: 'Though the Senate were to be judges on impeachments, and the members of it would not probably condemn a measure they had agreed to confirm, yet, as they were not a permanent body, they might be tried thereafter by other Senators.' (*Ibid.*, IV, 265.) See also the debate on this point in the House (*Annals of Congress*, 448–57, July 6, 7, 1797) — especially the arguments of Dana, who converted Gallatin to his view. Patrick Henry bluntly asserted, as to a Senator accused of bribery: 'You can impeach him before the Senate.' (*Elliot, Debates*, III, 355.)

In the *Federalist*, No. 64, John Jay implied that Senators were impeachable. William Rawle believed that the construction given to the Constitution, 'founded... merely on its phraseology, by which a member of the Senate was held not to be liable to impeachment,' was unwarranted, and unfortunate in its effect. *A View of the Constitution*, 213–14.

<sup>2</sup> This question has been raised in recent election contests (p. 165). Note especially the arguments in the Nye case, by Goff, insisting that a Senator is a 'civil officer of the United States' and citing authorities, particularly *Burton v. U.S.*, 202 U.S. 344; Jan. 7, 1926, *Cong. Rec.*, 1626–27; Stephens, Jan. 8, 1926 (*ibid.*, 1681), and Jan. 12 (*ibid.*, 1899 ff.).

the House on charges of bribery and corruption. Informed by the committee's chairman that an impeachment resolution was about to be presented to the House, Belknap hurriedly submitted his resignation to President Grant, who accepted it a few hours before the impeachment resolution was actually passed.<sup>1</sup> At the trial, therefore, his counsel contended that the Senate had no jurisdiction, inasmuch as at the time of the passage of the resolution Belknap was no longer Secretary of War but a private citizen of Iowa. After nearly two weeks of debate, a test vote was taken (May 29, 1876) on this resolution:

That in the opinion of the Senate, William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

The vote stood: yeas, 37; nays, 29 — a vote, it is to be observed, falling far short of two-thirds. The trial dragged on for two months. When the Senate was finally called on for its decision, 'Not guilty' was the response of twenty-five Senators on each of the five articles; 'Guilty' was the response of from thirty-five to thirty-seven on each of the articles.

It is to be noted that the vote by which the Senate asserted jurisdiction was substantially the same as those by which the respondent's guilt was declared.<sup>2</sup>

In urging that resignation or the expiration of his term should not render a person immune to impeachment, in the Belknap trial the

<sup>1</sup> Jesse R. Grant has asserted that President Grant practically demanded that Belknap resign, because he believed that Belknap had had no complicity in the 'grafting' which had been planned and carried out by his sister-in-law, who later became his wife. Article in *Harper's Magazine*, April, 1925.

<sup>2</sup> The Senators availed themselves freely of the opportunity given them to file reasons for the answers they had given. For example, while 32 out of the 35 who replied 'Guilty' gave no reasons, only one man of those who replied 'Not guilty' failed to file some explanation. Twenty-four Senators distinctly avowed lack of jurisdiction as the reason for their vote; only one avowed a belief that the Senate's majority vote, cited above, had settled the question of jurisdiction, and grounded his vote on another basis than the lack of jurisdiction. The following responses may serve as illustrations:

Mr. Oglesby: The question of jurisdiction in this case raised by the pleadings having been settled by the Senate, though adversely to my understanding of the Constitution, nothing is left but to pass upon the proofs under each article. As I do not entertain a reasonable doubt of guilt under this article, my vote is 'Guilty.'

Mr. Booth: Guilty, Mr. President. If the question of jurisdiction were proposed, I should vote against it . . . but I am clearly of the opinion that it is competent for the Senate, sitting as a court of impeachment, to decide that question by a majority vote, and that, such decision having been made, it is the law of this case until reversed.

Mr. Conkling: To vote 'Guilty' on this impeachment, I must on my oath find three things: First, that impeachment will lie against a private citizen holding no civil office; second, that the acts charged are impeachable; and third, that they are proved. I cannot find the first of these things, and therefore I must vote 'Not guilty,' in which vote I consider no question except the first one — the question of jurisdiction.

managers insisted that the power of impeachment was granted for the public protection; to assure that protection, it was necessary not only that a dangerous official be removed but that he be permanently disqualified from holding office under the United States. The stigma of that disqualification might prove one of the most salutary parts of the penalty, both for the offender and for the public. It was insisted that the jurisdiction over an officer attached to him for the rest of his life. It was asserted that in Blount's case both of the counsel for the respondent had concurred in the opinion expressed by Jared Ingersoll: 'I certainly shall never contend that an officer may first commit an offense and afterwards avoid punishment by resigning his office.'<sup>1</sup> John Quincy Adams was quoted as saying: 'I hold that . . . any officer of the United States is as liable twenty years after his office has expired as he is while he continues in office.'<sup>2</sup>

That impeachment after the office had been vacated was considered normal by some framers of the Constitution is indicated by the fact that in the Convention there was advocacy of confining impeachment of the President to a time when he was out of office.<sup>3</sup>

In opposition to the impeachability of one who by resignation or the ending of his term has ceased to be a civil officer of the United States, it was urged that the provision for impeachment, being penal, must be construed strictly; that impeachment of such a person might involve his being put twice in jeopardy for the same offense; and that the holding a man liable to impeachment at any moment throughout his later life would be a terrible weapon in the hands of his opponents. In qualification of the force of this last argument, it may be noted that in a century and a half, even in periods of the most bitter partisanship, the House has never shown a disposition to make such vengeful use of impeachment against a man no longer in office. Neither the Blount

<sup>1</sup> Wharton, *State Trials*, 284; 296.

<sup>2</sup> The analogy was used of a director of a national bank, an indictment against whom no court would dismiss on the ground that his official term had expired. 'The public safety may well demand the perpetual disqualification from office of a criminal whom it was not possible to impeach during his official term because evidence to prove his guilt had not then been discovered.' George F. Hoar declared that the counsel for the defendant was virtually saying: 'Judgment in case of conviction shall be removal from office and disqualification, if the defendant is willing. If unwilling, he resigns.' Attention was called to the point, that if the President's acceptance gives effect to a resignation, the President may then in effect have the power to pardon an impeached officer — a thing forbidden in the Constitution.

<sup>3</sup> Elliot, *Debates* (1845), V, 341–42. *Papers of James Madison* (1840 ed.), 1153–54, July 20, 1787. The Virginia Constitution of 1776 provided: 'The Governor, when he is out of office . . . shall be impeachable.' (F. N. Thorpe, *Charters and Constitutions*, VII, 3818.) For other similar provisions, see Roger Foster, *Commentaries*, 577, n. 11.

nor the Belknap case affords a precedent for such action, for both of these men were still in office at the time when the House began investigations which might naturally lead to impeachment, and it seemed evident that both had committed offenses so serious that their impeachment could not be denounced as partisan 'persecution.'

In effect the House has given its approval to the doctrine that as soon as a man ceases to hold office he ceases to be subject to impeachment; for it has repeatedly dropped impeachment proceedings when the man against whom they were aimed has resigned while an investigation of his acts looking toward impeachment has been under way.<sup>1</sup>

May resignation effect an 'exit from office' during an impeachment trial as well as if the resignation had been presented before the House had formally voted to bring impeachment charges? Foster replies:

After the jurisdiction of the court has once attached, by the vote of the House of Representatives, that an officer be impeached, it may well be claimed that no subsequent act by him or by the President can divest it.<sup>2</sup>

This publicist's opinion is not sustained by the Senate's action in the trial of Judge English. The House voted that he be impeached, and chose managers. April 23, 1926, the Senators took the special oath for trial of the case,<sup>3</sup> and May 4, English appeared before the 'court,' both in person and by counsel, and denied the charges. The next day the Senate adjourned its sitting, 'as a high court of impeachment,' until November 10.<sup>4</sup> November 4, English's counsel tendered his resignation to the President, in the presence of the Attorney-General, and of the ranking members of both parties on the board of managers. With their approval, it was accepted. Accordingly, when the 'court' was convened, November 10, the chairman of the managers announced

<sup>1</sup> Such action was taken in the cases of two U.S. District Judges, E. H. Darrell of Louisiana (1873) and Richard Busteed of Alabama (1873).

<sup>2</sup> R. Foster, *Commentaries*, 576.

<sup>3</sup> *Cong. Rec.*, 8026. Please, for personal reasons, asked to be excused from taking any part in the trial. Williams insisted: 'I do not think it is competent for us to excuse the Senator from South Carolina from taking the oath as a member of the court.... I ask the Senator from South Carolina to take the oath.'

<sup>4</sup> This action obviated the necessity of the President's calling a special session of Congress. The question was repeatedly raised, whether the Senate could sit as a court of impeachment while the House was not in session. No authoritative decision was reached. Several Senators expressed the view that such sitting was not authorized by the Constitution, but agreed that, technically, the situation might be met by a gentlemen's agreement that a few members of the House meet, and adjourn for three days at a time, with the understanding that no call for a quorum would be made. April 23, 1926, *Cong. Rec.*, 8027-28.

that English's resignation had been accepted. The 'court' forthwith adjourned until December 13 — a week after Congress was to convene in regular session — to await any action which the House might take. On that day the chairman of the managers presented a resolution, passed by the House December 11, declaring:

In consideration of the fact that the said George W. English is no longer a civil officer of the United States, . . . the House of Representatives does not desire further to urge the articles of impeachment heretofore filed.<sup>1</sup>

And by direction of the House he 'respectfully requested' the Senate to discontinue the pending proceedings. An order was at once introduced that the impeachment proceedings be dismissed.

This brought out lively debate. Not one of the speakers took the ground that English's resignation and its acceptance formed any bar to the continuance of the impeachment trial. Many deplored the action of the House in practically withdrawing the charges,<sup>2</sup> but found the Senate placed in this position:

They [the House] do not suggest that we dismiss the case; they request it. . . . It seems to me that we are in all comity bound to accede without question to their request.<sup>3</sup>

The query was raised how the Senate could proceed under the articles of impeachment to try English, with the House refusing to take cognizance of the case. There was but the remotest chance that English — an old man, resigning in disgrace — could ever again hold 'an office of honor, trust or profit under the United States.' So, by a vote of 70 to 9 the motion to dismiss the impeachment proceedings was agreed to.<sup>4</sup>

<sup>1</sup> *Cong. Rec.*, 344.

<sup>2</sup> Dill, Norris, Wheeler, and Bruce. See comment by T. J. Walsh.

<sup>3</sup> D. A. Reed, *Cong. Rec.*, 346.

<sup>4</sup> J. A. Reed stated what was in everyone's mind, that 'to tie up the House of Representatives at least in part and the Senate completely, for weeks, would be almost a public disaster.' Borah suggested that the dismissal of the proceedings will give us 'more time to devote to cleaning our own house' (*ibid.*, 348).

Judge F. A. Winslow's resignation was accepted, April 1, 1929, almost as soon as a House committee had begun a preliminary investigation, to determine whether impeachment charges should be brought before the Senate. In this case, citing action following English's resignation, the House voted that no further proceedings be had — but not before Dowell had protested: 'If there is any foundation for the impeachment charges, they should be followed through, and the officials who have had the responsibility of the matter should see to it that prosecution is had, if the evidence warrants it.' The chairman replied that that matter 'is in the hands of the district attorney of New York, who is conducting an investigation as to whether or not criminal proceed-

**MAY AN OFFICER BE IMPEACHED FOR OFFENSES NOT CONNECTED WITH HIS PRESENT OFFICE?**

Although decisions in state impeachment trials seem all to be in favor of an affirmative answer, the Senate has never passed definitely upon this question. In 1912, Judge Archbald, a Circuit Judge assigned to the Commerce Court, was brought to trial. The first six articles related to offenses committed since he had become Circuit Judge; the next six, to offenses as a District Judge before his promotion, and the thirteenth to acts committed while holding each of the positions. He was acquitted on all the charges based only on his acts as District Judge, and convicted on those relating to the office he was then holding. But the vote, 'Not guilty,' on articles seven to thirteen may have been due to a belief that those charges were too trivial, or to uncertainty as to the question of jurisdiction — a question of the less importance because he had already been pronounced guilty on other articles. On the thirteenth article, although 'the charge contained was sustained by wrongful acts committed while holding the office of Circuit Judge,' nearly one-third of the Senators answered 'Not guilty.'<sup>1</sup>

**MAY AN OFFICER BE IMPEACHED FOR UNOFFICIAL ACTS?**

In the Blount case the offenses had not been committed in connection with his duties as Senator. House Managers Bayard and Harperings should be had against him.' (Dec. 20, 1929.) No prosecution was instituted in that district. (Letter to the writer from U.S. Attorney Martin Conboy, June 20, 1934.)

*Death Stays Impeachment Proceedings.* April 26, 1933, by a vote of 209 to 150, the House ordered an inquiry by its Judiciary Committee to determine whether Judge James A. Lowell, of the U.S. District Court (Mass.), be removed from office. Representative H. W. Smith of Virginia had presented seven articles of impeachment against Judge Lowell, who, by *habeas corpus*, had liberated an ex-convict, charged with murder, whose extradition to Virginia had been approved by Governor Ely of Massachusetts. Smith charged that, in so doing, Judge Lowell had willfully violated his oath of office and the Constitution and had abused his powers. The Judge justified his action on the ground that in Virginia the accused Negro would not be assured of a fair trial, since Negrées were not admitted to serve as jurors in that state. The Circuit Court of Appeals reversed Judge Lowell's decision. Before the House committee had started upon a formal investigation, Judge Lowell died. The chairman of the subcommittee stated to the House that a careful preliminary inquiry had discovered nothing that would justify a formal hearing by the committee, but had convinced him that Judge Lowell was incapable of entertaining a dishonest impulse. (Feb. 6, 1934, *Cong. Rec.*, 2075.) The House voted that no further proceedings be had under the impeachment resolution.

<sup>1</sup> Judge Archbald's counsel called attention to the possibilities involved, if, for example, the then President of the United States (Taft) were held impeachable for some offense committed in any one of the civil offices he had held before becoming President, and were removed from his present office in consequence of conviction. It has been suggested that a hostile two-thirds majority in the House and Senate might prevent a President-elect from taking office, if in any civil office under the United States he had committed an offense which could be made the basis of an impeachment. Simpson, *Federal Impeachments*, 62.

presented able arguments to the effect that impeachment was not limited to official acts.<sup>1</sup> In dismissing that case with a declaration of no jurisdiction, the Senate established no precedent in this regard. In the next three impeachments only official acts of the accused figured in the articles. The high crimes and misdemeanors alleged against Humphreys, Johnson, and Swayne included some offenses which were not committed in the discharge of official duties. Although two of these respondents were acquitted, it was not upon this particular ground. There is nothing in the impeachment trials of the past century to indicate that the Senate would hold an offense unimpeachable because not committed in direct relation to the respondent's office, provided the effect of that act was to bring that office into ignominy and disrepute. 'It will not do to say that a convicted willful murderer could defend himself from impeachment on the ground that the murder was not committed *virtute officii.*'<sup>2</sup>

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#### THE MAJORITY REQUIRED FOR CONVICTION

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'No person shall be convicted without the concurrence of two-thirds of the members present.' Although the Constitution requires this exceptional majority in order to convict, vital issues have again and again been decided by much smaller majorities — decisions which in fact predetermined the outcome of the trial, or blurred the final verdict. Thus, in the Blount case the resolution asserting that he was an officer subject to impeachment was defeated by a vote of 11 to 14 in a Senate where 27 members were sworn. In the Belknap case the resolution, that he was amenable to impeachment notwithstanding his resignation and its acceptance, was passed by a vote of 37 to 29 — 7 Senators not voting. The presiding officer's ruling that the Senate's jurisdiction was thus sustained was challenged by the respondent's counsel on the ground that a two-thirds majority had not concurred in it. A vote of 21 yeas to 16 nays (36 not voting) on the resolution that

<sup>1</sup> G. T. Curtis, *Constitutional History*, I, 481-82; Story, *Commentaries*, sec. 804.

<sup>2</sup> Simpson, *Federal Impeachments*, 53.

the trial proceed as upon a plea of not guilty sufficed to carry the trial forward to its inconclusive verdict.

In the Johnson trial conviction failed but by a single vote of the requisite two-thirds, yet in the trial evidence was admitted some fifteen times when less than two-thirds of those present had voted for its admission.<sup>1</sup>

In the final roll-call members have abstained from voting, sometimes having sought and obtained formal excuse from the Senate.<sup>2</sup>

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#### THE SCOPE OF THE SENATE'S JUDGMENT

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Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, judgment and punishment, according to law.<sup>3</sup>

From this section and from the other which provides that various officers 'shall be removed from office on impeachment for, and conviction of, treason,' it would seem that removal is mandatory and might be declared by the presiding officer, without special vote. Nevertheless, in each case of conviction the Senate itself has taken formal action. Thus, in the Pickering case, the record states the vote of 'Guilty' (19 to 7) on each of the four articles, and proceeds: 'On the question, "Is the court of opinion that John Pickering be removed from the office of judge . . . ?" it was determined in the affirmative, yeas, 20, nays, 6.'<sup>4</sup> And the court then adjourned *sine die*. The question of the further penalty, disqualification to hold office, was not

<sup>1</sup> In many trials the attendance of Senators has been at times very slender. During the Archbald trial, in a Senate numbering more than 90, rarely over 20 Senators were present. (Simpson, *Federal Impeachments*.) Whenever the question of the absence of a quorum was raised, at the sound of the bell enough Senators would make their appearance to be counted and then would disappear.

<sup>2</sup> Two were thus excused in the Peck trial; in the Archbald case, a number of Senators were excused from voting on those articles which alleged offenses prior to his holding his then office.

<sup>3</sup> Constitution, art. I, sec. 3, pars. 6 and 7. This provision reproduces almost word for word a section of the Massachusetts Constitution of 1780 (ch. I, sec. II, art. VIII).

<sup>4</sup> One Senator who had voted 'Not guilty' voted for Judge Pickering's removal.

brought up for action, doubtless because it was evident that the judge was hopelessly insane.

In the Humphreys trial, the presiding officer made formal declaration of 'Guilty' at the conclusion of the voting on each article. The 'court' then took a recess until the appointed hour at which judgment was to be pronounced. Each Senator was then called upon to respond to the following questions:

(1) Is the court of opinion that West H. Humphreys be removed from the office of judge . . .? (Yea, 38; nays, 0.)

(2) Is the court of opinion that West H. Humphreys be disqualified to hold and enjoy any office of honor, trust or profit under the United States? (Yea, 36; nays, 0.)

The presiding officer then made formal announcement that the judge 'be and he is removed' and that he 'be and he is disqualified.'

In the Archbald case, having found him guilty on five out of the thirteen articles, the Senate decreed his removal by a unanimous vote, and his disqualification to hold office by a vote of 39 to 35.<sup>1</sup> By its action in these two cases the Senate has practically asserted its right to remove and disqualify, or to remove without disqualifying the man under conviction.

It was the plain intent of the framers of the Constitution that finality should attach to the penalty imposed by the Senate, for the President's power to grant reprieves and pardons for offenses against the United States is explicitly declared not to extend to 'cases of impeachment.' President Grant's action in accepting the resignation of his Secretary of War within two hours before the House acted on the resolution for his impeachment shows that a President may in effect disregard the spirit of this limitation. The precedent is disquieting.<sup>2</sup> However, throughout the debate on the English impeachment it was clearly assumed that resignation under such circumstances does not remove an accused official from the jurisdiction of the Senate in an impeachment trial.<sup>3</sup>

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The Constitution's provisions as to impeachment have been put to the test of nearly a century and a half of experience. During that

<sup>1</sup> In the Johnson trial, Sumner introduced a resolution, which did not come to a vote, asserting that the requirement of a two-thirds majority did not extend to the vote on disqualification.

<sup>2</sup> R. Foster, *Commentaries*, 575.

<sup>3</sup> Page 868.

period the Senate both in size and personnel has been developing into a tribunal less suited to the performance of this quasi-judicial function.

What is the outlook for the future? In the first place, although thousands of civil officers may seem to be amenable to impeachment, in fact the precedents indicate a much narrower applicability. It is highly improbable that the impeachment of a Senator or a Representative will ever again be attempted.

A President will rarely allow his administration to be smirched by an impeachment trial of a member of his Cabinet. Unless convinced of the accused's innocence, he will require his resignation, or will remove him.<sup>1</sup> In repeated instances the Senate has shown an unwillingness to convict, even when certain charges had been proved, the Senators apparently feeling that the procedure and the penalties were out of all proportion to the alleged offenses, and that it was a mistake to 'bring out a blunderbuss to kill a fly.' The misdemeanors must be 'high' — 'so high that they belong in this company with treason and bribery.'<sup>2</sup> Hence the vast majority of minor offenses will be dealt with by some other process, or will be winked at in confidence that the offender's opportunities to do evil will soon end.<sup>3</sup> The discussion and the voting in the Archbald trial indicate that the Senate will hesitate to convict on charges of offenses committed in an office which the respondent no longer holds at the time when the impeachment is instituted.

But federal judges stand in a class by themselves. Placed on the bench, not by election but by the President's appointment, the Constitution requires that they shall 'hold their office during good behavior,' and the lack of an optional method of removal (for example, by the Executive on address by both branches of the Legislature,<sup>4</sup> a process common in the state governments) makes it probable that in the future the proportion of judges among impeached 'civil officers' will be even higher than in the past. This is unfortunate both for the judiciary and for the Senate. The accused judge finds himself 'pitchforked into the political arena,' and the Senate looks upon impeachment trials of judges as a tedious distraction from pressing legislative

<sup>1</sup> Page 865.

<sup>2</sup> Page 859.

<sup>3</sup> Apparently the House was deterred from impeaching Vice-President Schuyler Colfax mainly by the fact that in a few days he would be out of public office.

<sup>4</sup> C. H. McIlvain, 'The Tenure of English Judges,' *American Political Science Review* (May, 1913), 217-29. English precedent indicates that 'address' by the two Houses of Congress would probably mean a trial.

business, an uncongenial task which is usually slighted or dealt with in partisan spirit.<sup>1</sup>

#### PROPOSED CHANGES IN IMPEACHMENT PROCEDURE

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After the Chase and Archbald trials, for different reasons great dissatisfaction was felt with the impeachment procedure, and unsuccessful efforts were made to remedy the difficulty by amending the Constitution. But the delay and difficulty which attend amendment give interest to the question: What remedies may be attained without change in the fundamental law?

The Senate makes its own rules governing trials, and has it within its own power to remedy some obvious defects. Two recent trials (Swayne and Archbald) sorely taxed the patience of the Senate, for both came at times when the legislative program was exceptionally pressing. In the first place, it has been suggested, a much-needed change in methods of securing evidence might be brought about by allowing the evidence to be taken by a committee of the Senate, as has been done in the House of Lords, and as is frequently done by sub-

<sup>1</sup> May it be possible to lessen the number of impeachments brought to the Senate for trial? Nine out of the twelve thus far brought to the bar of the Senate have been judges. It has generally been assumed that an unworthy judge could be removed only by impeachment. But during the Archbald trial (*2 Proceedings*, 1661) Senator Catron challenged this assumption, making an interesting suggestion, although the constitutionality of the proposed legislation is doubtful. While all federal judges 'shall hold their office during good behavior,' the Constitution makes no explicit provision as to how the 'goodness' of their behavior shall be determined, and Catron contended that under the 'elastic clause' Congress has the power to make all laws necessary and proper for carrying into execution the powers vested in the judiciary department, so that they shall be administered by fair, honorable, and competent judges. In his opinion this might be accomplished by Congress's defining what constitutes 'good behavior,' or at any rate providing 'a method for ascertaining whether or not the judges are complying with the terms under which they hold,' and causing them to forfeit their offices if they are not so complying. A district judge might thus be brought before a tribunal made up of circuit judges; a circuit judge might be brought before the Supreme Court. A method would thus be provided whereby all judges except those on the Supreme Bench might be brought to book before a court where their 'good behavior' could be determined by a genuinely judicial process, and whereby their removal might be secured for other offenses than those which a political and partisan Senate would by two-thirds majority agree were impeachable high crimes and misdemeanors.

On the day following the tedious trial ending in the conviction of Judge Ritter there was much discussion among Senators of the need for simplification of the impeachment procedure. See press reports of April 18, 1936.

committees in Senate investigations.<sup>1</sup> Better still<sup>2</sup> would be provision by Act of Congress whereby testimony might be taken before United States judges within reasonable distance of the places where the witnesses reside, representatives of the House and counsel for the accused having opportunity to examine and cross-examine as in other trials, and the testimony thus secured to be available both for the preliminary hearing before the House and for the trial before the Senate. This would secure a more fair and consistent application of rules of evidence than is possible in a Senate trial, and a substantial saving of expense would be likely in avoiding the summoning to Washington of numerous witnesses from remote sections of the country, as in the Peck, Belknap, Swayne, Archbald, and Ritter trials.<sup>3</sup>

In the Senate trial itself great waste of time has taken place. 'Days were spent in proving admitted facts.' In some cases certain articles could be decided without taking any evidence. Simpson commends the wisdom of the Senate in the Johnson trial in adjourning *sine die* after votes on three of the articles had demonstrated that the President could not be successfully impeached, and suggests that the Senate should pick out one charge alone — when that one, if proved, would be sufficient to justify both removal and disqualification — and should not, as in the past, take evidence on all the articles before voting on any one. In the Swayne trial waste of time and confusion of

<sup>1</sup> Upon this suggestion, the Honorable George R. Stobbs, a House manager in the trial of Judge English, commented to the writer: 'In an impeachment trial the Senate is judge-jury in a quasi-criminal case, and to judge of the accused's guilt or innocence and of the witness's trustworthiness, the Senate should see the man.'

<sup>2</sup> In the opinion of Alexander Simpson, Jr., who had opportunity to study all phases of the Archbald trial (*Federal Impeachments*): 'There ought to be devised at once some system of procedure in the Senate which would enable the ascertainment of the facts for the Senate without the necessity of the Senate sitting here as a body, listening for weeks to the oral testimony of witnesses delivered in its presence.' J. A. Reed, in debate on the English impeachment, Dec. 13, 1926, *Cong. Rec.*, 346.

See similar proposals made in the House by Sumners (Texas). His resolution (H. C. Res. 41) provided for the appointment of a joint committee of three Representatives and three Senators to study the procedure of House and Senate as to impeachments, and make recommendations. He declared: 'All students of the American system of impeachment must agree that the procedure is ridiculous.... With the rapid increase of federal officials who can be removed only by impeachment, and with the increase of legislative and other duties of the Senate, to have a procedure which requires the whole Senate to suspend all other business while each witness testifies in person presents a situation which must be remedied.' This resolution was debated and agreed to by the House (July 3, 1930, *Cong. Rec.*, 12507-09). In the Senate it was referred to the Committee on the Judiciary (Dec. 8, 1930, *ibid.*, 309), but was not reported. In the next Congress Sumners introduced a similar resolution (H. C. Res. 8) which died in the Committee on Rules.

<sup>3</sup> Eighty-five witnesses had been summoned for the managers, in anticipation of the trial of Judge English.

issue might have been avoided, if, at the beginning of the trial, a decision could have been secured whether the offenses, if proved, would, in the opinion of the Senate, constitute impeachable misdemeanors.<sup>1</sup>

De Tocqueville remarked that a decline of public morals in the United States would probably be marked by the abuse of impeachment as a means of crushing political adversaries or ejecting them from office.<sup>2</sup>

'Impeachment is a farce which will not be tried again,'<sup>3</sup> said President Jefferson at the end of the Chase trial, which he himself had instigated in the hope of ousting the Federalists from their control of the judiciary. Later, he characterized impeachment as 'the scarecrow of the Constitution.' For his theory of impeachment was identical with that of Senator Giles, who said frankly in the hearing of his colleague, John Quincy Adams, that a removal by impeachment was nothing more than a declaration by Congress that 'we want your offices for the purpose of giving them to men who will fill them better.'<sup>4</sup>

There is ground for pride in the record which the Senate has made in the trial of impeachments. In the Pickering case, it is true, partisanship led to a perversion of justice. But for more than a century in no impeachment trial has there lacked a controlling group in the Senate who steadfastly held that the trial must do impartial justice to the accused, and not merely serve as a 'means of crushing political adversaries or ejecting them from office.' Even the Johnson trial, 'taking place in the midst of great excitement, was conducted with gravity according to the forms of law.' In the 'opinion' which he filed on the day of the rendering of the verdict, Charles Sumner, that most implacable of the President's foes in the Senate, said:

The people have heard it [the evidence] also, day by day as it was delivered, and have carefully considered the case on its merits, properly dismissing all apologetic subtleties. It will be for them to review what has been done. They are above the Senate, and will 'rejudge its justice.'

<sup>1</sup> Simpson, *Federal Impeachments*. The advantages of these proposed changes are set forth (68-77). In an appendix (213-22), they are presented in concrete form in 'Suggested Rules of Procedure and Practice for the Senate of the United States in Impeachment Cases.'

<sup>2</sup> Cited by J. I. C. Hare, *American Constitutional Law*, 211.

<sup>3</sup> W. Plumer, *Memorandum*, 325.

<sup>4</sup> *Memoirs*, I, 321-23.

That they have done. And the people's verdict is: 'The glory of the trial was the action of the seven recusant Senators.'<sup>1</sup> But, at the hands of the people of Tennessee, vindication far more prompt and dramatic had already come to Andrew Johnson. Less than seven years from the day when in the Senate Chamber by a single vote he had escaped removal from the Presidency, he proudly re-entered that Chamber and unchallenged took once more the oath of a duly elected Senator of the United States.

#### SENATE IMPEACHMENT TRIALS

*William Blount*, Senator of the United States, from Tennessee.

Five Articles. Accused of tampering with the Indians in the interest of the British. He had been 'sequestered' from his Senate seat, before brought to trial.

Trial, December 17, 1798, to January 14, 1799.

Acquitted for want of jurisdiction.

*John Pickering*, Judge of United States District Court, New Hampshire.

Four Articles. Accused of irregularities in judicial procedure, loose morals and intemperance. He was insane at time of trial.

Trial, March 3, 1803, to March 12, 1804.

Convicted by party vote. Removed.

*Samuel Chase*, Associate Justice, United States Supreme Court.

Seven Articles. Accused of partisan and harsh conduct on the bench, and unfairness to litigants.

Trial, November 30, 1804, to March 1, 1805.

Acquitted.

*James H. Peck*, Judge of United States District Court, Missouri.

Articles. Accused of unreasonable and oppressive penalty for contempt of court.

Trial, April 26, 1830, to January 31, 1831.

Acquitted.

*West H. Humphreys*, Judge of United States District Court, Tennessee.

Seven Articles. Accused of advocating secession, and accepting office as a Confederate judge.

Trial, May 7, 1862, to June 26, 1862.

Convicted. Removed and disqualified.

<sup>1</sup> J. F. Rhodes, *History*, VI, 56. There is evidence that three other Senators would have voted with the seven had their votes been necessary to secure acquittal — Sprague, Willey, and Morgan. (Horace White, *Lyman Trumbull*, 321.) But not one of the seven Republicans who voted 'Not guilty' ever again held an elective office. 'They were hounded to their political death.' Ross later declared: 'I felt most forcibly, in casting the vote I did, that I was with my own hands digging my political grave.' In 1870, Senator Sherman said to Henderson: 'You were right in your vote, and I was wrong.' In his *Recollections* Sherman wrote: 'After this long lapse of time I am convinced that Mr. Johnson's scheme of reorganization was wise and judicious.' (Quoted by G. W. Pepper, *Family Quarrels*, 119.)

*Andrew Johnson*, President of the United States.

Eleven Articles. Accused of violation of Tenure of Office Act, and rancorous speeches upon the personnel and acts of Congress.

Trial, February 25, to May 26, 1868.

Acquitted.

*William W. Belknap*, Secretary of War.

Five Articles. Accused of graft in connection with appointment and retention of an Indian post trader at Fort Sill. His resignation had been accepted before he was brought to trial.

Trial, March 3, to August 1, 1876.

Acquitted for want of jurisdiction.

*Charles Swayne*, Judge of United States District Court, Florida.

Five Articles. Accused of use of private car of railway in hands of receiver appointed by him. Living outside of his district. Improper fining of an attorney for contempt.

Trial, December 14, 1904, to February 27, 1905.

Acquitted.

*Robert W. Archbald*, Associate Judge, United States Court of Commerce.

Five Articles. Accused of improper use of influence. Accepting favors from litigants.

Trial, July 13, 1912, to January 13, 1913.

Convicted. Removed from office.

*George W. English*, Judge of United States District Court, Illinois.

Five Articles. Accused of tyranny, oppression, and partiality. Appeared before the Court, May 4, and denied charges. May 5 the Senate, as High Court of Impeachment, adjourned till November 10. November 4, the President accepted his resignation. The Court adjourned till December 13, 1926. On request of the House managers the Court dismissed further impeachment proceedings.

*Harold Louderback*, Judge of United States District Court, California.

Five Articles. Accused of favoritism and conspiracy, in appointing receivers, etc.

Trial, May 15 to May 24, 1933.

Acquitted.

*Halsted L. Ritter*, Judge of United States District Court, Florida.

Seven Charges. Accused of various improprieties. Acquitted on six of the charges; on the seventh — an 'omnibus' charge comprising the previous six — he was found guilty of having brought his court into scandal and disrepute.

Trial, April 6 to 17, 1936.

Convicted, and removed. On vote to disqualify: Yes, 0; no, 76.

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## XVI

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SENATORS' PRIVILEGES, PAY, AND PERQUISITES

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Senators . . . shall not be questioned for any speech or debate in the Senate in any other place.

U.S. CONSTITUTION, Art. I, sec. 6, cl. 1

I may call a man a thief on the floor of this House. It may be given the widest publicity through the *Congressional Record* and perhaps be permitted to go into the press, but he has no forum where he may appear and even ask me why I said it. . . . But constitutional immunity should not be permitted to become the shield of a liar or a coward.

SENATOR HIRAM BINGHAM (February 2, 1931)

The mail coming to my office, I am told, is the largest ever sent to a Senator's office. . . . My state represents a population equal to eighteen other states of the Union. Yet my office has the same staff that the Senator from each one of those states has. My state pays nearly thirty percent of the taxes of the country.

SENATOR ROYAL S. COPELAND (N.Y.)  
(in Senate Debate, March 14, 1924)

An expert observer recently remarked that if a man were in Congress two terms and during that time used his franking privilege to its full possibility, he could make his position impregnable.

SENATOR FREDERICK H. GILLETT

The whole thing of sending out these seeds has become a howling farce.

SENATOR WILLIAM S. KENYON (March 5, 1918)



# XVI

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## SENATORS' PRIVILEGES, PAY, AND PERQUISITES

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### IMMUNITY FROM ARREST

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BY THE Constitution Senators are guaranteed immunity from arrest, in all cases except treason, felony, and breach of the peace, during their attendance at the session of the Senate, and in going to and returning from the same. ‘Breach of the peace’ is interpreted so broadly — including ‘all indictable offenses, as well those which are in fact attended with force and violence as those which are only destructive of the peace of the government’ — that in reality the Senator is exempt from none of the ordinary processes of the criminal law. This immunity’s principal application is, therefore, to writs and other processes in civil suits, disobedience to which might otherwise result in imprisonment. During the periods mentioned in the Constitution, the Senator cannot be constrained to do things (for example, to testify in a court, to serve on a jury, or to respond to an action brought against him) which would prevent his service in the Senate.<sup>1</sup>

<sup>1</sup> Compare *Williamson v. U.S.*, 207 U.S. 425, with *U.S. v. Cooper*, 4 Dall. 341. In the latter it was held that ‘There is no privilege to exempt Members of Congress from the service, or the obligation, of a subpoena in criminal cases.’ In 1845, Allen announced that, as he had received the subpoena, he would, therefore, be under the necessity of leaving the Senate to obey the order. But Webster suggested that, when a Senator received a subpoena, it was the usual course for him to ask permission of the Senate to obey the order. Accordingly Allen made such a request, which the Senate granted. *Cong. Globe*, 66, Dec. 17, 1845.

In 1929, Bleuse denounced the police department of the District of Columbia, but refused to heed a subpoena for him to testify to his charges before the grand jury. Justice Peyton Gordon of the Supreme Court of the District of Columbia ruled that members of Congress were immune from arrest while Congress was in session, and that, as a subpoena could only be enforced by arrest, nothing could be done about it. Heflin, who

Jefferson declared that this privilege from arrest was 'with reason, because a member has superior duties to perform in another place.... When a Senator (as contrasted with a Representative) is withdrawn by summons, his State loses half its voice in debate and vote, as it does on his voluntary absence. The enormous disparity of evil admits of no comparison.'<sup>1</sup>

### FREEDOM OF SPEECH

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'For any speech or debate in either House, they [the members] shall not be questioned in any other place.' Such an immunity had been insisted upon in the practice of the English Parliament to protect its members from arbitrary arrest for criticism of the King. In Professor Henry J. Ford's opinion this guarantee was placed in the Constitution to protect the American legislators against responsibility to their constituents.<sup>2</sup> This protection is not limited to spoken words; it applies also to written reports, resolutions, and votes. Whether the phrases which a complainant might seek to 'question' are immune if they were used in the course of the Senator's official service, not merely in Senate Chamber, but in the committee room or in the lobby, is a moot question.<sup>3</sup>

By its own rules the Senate has put some slight curbs upon the language which may be used by its members in debate, but these relate to remarks imputing to another Senator any conduct or motive unworthy or unbecoming a Senator, or offensive reference to any state in the Union. But Senators may make the most sweeping and unsupported assertions, impugning the motives, assailing the character, and was requested to appear and testify in the same grand jury investigation, did not refuse to appear, but sent a note giving the source of the information upon which the charges in his Senate speech had been based. Press reports of Dec. 6 and 10, 1929.

<sup>1</sup> 'Section III. Privilege,' of Jefferson's *Manual*, annually reprinted in *Rules and Manual of the United States Senate*, is of great interest. See also *Precedents Relating to the Privileges of the Senate*, compiled by George P. Furber, 1893 (52d Cong., 2d sess., Misc. Doc. 68).

<sup>2</sup> *Rise and Growth of American Politics*, 63.

<sup>3</sup> Congressman Fort held that 'what is said in the meeting of a committee or in the lobby of the House is not privileged.' Feb. 10, 1931, *Cong. Rec.*, 4539. But see Robert Luce, *Legislative Procedure*, 329, and *Coffin v. Coffin*, 4 Mass. 1.

denouncing the deeds of private individuals, yet escape the penalties ordinarily imposed for slander, by pleading senatorial immunity.<sup>1</sup>

<sup>1</sup> Attempts to secure redress may be illustrated by the case of *Cochran v. Couzens*, cited here with no reference to the justification or propriety of the Senator's remarks, but merely to show the plaintiff's procedure and the conclusiveness of the plea of immunity. April 12, 1928, Couzens (Mich.) on the floor of the Senate denounced the business methods of an income-tax expert, Howe P. Cochran. Cochran at once filed a \$500,000 suit for slander against the Senator, who in return filed a motion to quash, claiming that the expressions complained of were uttered in the Senate Chamber, and were not to be questioned in any other place.

The points of law involved in the motion to dismiss for want of jurisdiction were argued, Nov. 9, 1928. The plaintiff's declaration averred that, although the words complained of were used in a speech in the Senate Chamber, they were spoken 'unofficially and not in the discharge of his official duties as a Senator,' but that they were spoken 'of and concerning a subject not then and there pertinent or relevant to any matter under inquiry by the said Senate.' In the opinion of the Court, Associate Justice Wendell P. Stafford wrote: 'The Constitution says nothing about "unofficially." To say that a Senator in a speech to the Senate at a regular session is not speaking "officially" is to say that a court, or a jury under the instructions of the court, is to determine when the words are spoken officially and when they are not.... The question arises whether the Constitution leaves it to someone other than the Senate to determine in some other place as to whether the words were pertinent. If so, then it meant that the Senator might be questioned in another place as to whether the words were pertinent. No such exception is to be found in the Constitution.... All the Court needs is to read the declaration and then read the Constitution, and its duty is plain.' Citing *Kilbourn v. Thompson*, 103 U.S. 168, and *Dillon v. Balfour*, L.R. 20 Ir. 600, the Court granted the motion to dismiss the cause for want of jurisdiction.

From this judgment the plaintiff took an appeal to the Court of Appeals. Its decision (June 2, 1930) is summarized thus: 'Defamatory words uttered during speech in the United States Senate Chamber held absolutely privileged, notwithstanding allegations they were not spoken in discharge of Senator's official duties.' The opinion ended: 'The averment that these words were spoken "unofficially" and not in the discharge of his duties as a Senator is a mere conclusion and entirely qualified by the averment that they were uttered in the course of a speech. Judgment affirmed with costs. Affirmed.' (42 F. [2d] 783.) October 20, 1930, the Supreme Court of the United States refused to entertain an appeal from this decision.

*Cannon v. Tinkham*. June 17, 1930, on the floor of the House, Congressman George Holden Tinkham made a speech in which he charged Bishop James Cannon, Jr. (Methodist Episcopal Church, South), with violation of the Federal Corrupt Practices Act, a criminal statute. Cannon denounced him for cowardice in making these charges where he was shielded by congressional immunity, and challenged him to give to the press his charges over his own signature. Tinkham at once issued such a statement (June 20), declaring Cannon to be 'a shameless violator' of that criminal statute in that he had received \$65,300 from a New York capitalist during the 1928 presidential election campaign, and 'illegally concealed the receipt of all of this money until Feb. 15, 1929, and has not yet accounted for \$48,300 of this amount, refusing to do so before the Senate Lobby Investigating Committee, before which he appeared voluntarily and where he was under oath and could have been cross-examined.'

A criminal suit against Cannon upon the alleged offenses was twice carried by him to the Supreme Court. At the second trial the counts against him were eliminated on a technicality; the only two counts remaining were against him and his secretary, for conspiracy, and in the subsequent trial they were not convicted.

A year later Cannon sued Tinkham for libel, demanding damages in the sum of \$500,000. The case, after several continuances on the ground of Cannon's illness, was brought to trial, and decision was given for the defendant, Tinkham, on the ground that Cannon had invited the publication of the derogatory remarks.

*Ansell v. Long*. Feb. 21, 1933, in a speech in the Senate, Long (La.) denounced Gen. Samuel T. Ansell, who was then acting as counsel for a Senate committee investigating

Resentment at the abuse of this congressional privilege of 'freedom of speech' is growing more pronounced. The press applauds 'the faith and the courage' of the man who brings suit in order to secure redress from the Senator or Representative who has slandered him in debate.<sup>1</sup> A recent change in the Senate rules provides for the considered irregularities in the election of Overton to the Senate. Long applied most abusive epithets to Ansell and charged him with grave offenses. Asked if he would claim immunity if suit were brought to test his accusations in the courts, his reply was: 'I do not claim any privilege from this scoundrel anywhere on earth under God's living sun.' When a Senator asked him if this meant that he was inviting Ansell to sue him, he instantly changed his phrase, replying: 'I invite him to sue me in any court of competent jurisdiction,' by which, as he later explained, he meant any court of his own state, Louisiana!

Ansell promptly brought suit in the Supreme Court of the District of Columbia, claiming actual damages of \$250,000 for slander in the charges made in Long's Senate speech, and \$250,000 as 'punitive damages for bringing Ansell into public slander, infamy, and disgrace.' In that court Long's attorney contended that under the Constitution's grant of immunity from arrest to members of Congress he was entitled to immunity from the service of a summons in a libel suit. The court held that a civil summons did not constitute 'arrest' in the meaning of the Constitution; that the court did not possess jurisdiction in a suit for slander based on Long's remarks in the Senate. But it was also held that the allegations made by the plaintiff were supported by sufficient evidence that the matter charged constituted libel. 'The offense consists not in what was said in the Senate, but in the publication and circularizing of the libelous documents.' (Not only had Long caused reprints of his speech to be sent out, but together with them he sent 'a letter calling special attention to the article' relating to Ansell.)

Feb. 5, 1934, the United States Court of Appeals for the District of Columbia affirmed the lower court's order denying the motion to quash the summons. The Supreme Court of the United States granted *certiorari* (292 U.S. 619). In the hearing, Long's attorney stressed 'the supreme necessity to the Government, to which private rights must yield, that a Senator must not be harassed by private litigation in the District of Columbia.' To this, Ansell replied: 'If a Senator or any of the thousands engaged here in the service of the public injure or destroy the person, property, or reputation of a citizen, or flout his obligations to merchant, tailor, butcher, or baker, this honorable Court is asked to say that the injured citizen shall have no redress in the courts here where the wrong is done, and must be content to follow the wrong-doing Senator into his own bailiwick — poor right indeed.' Mr. Justice Brandeis delivered the opinion of the Court: 'Senator Long contends that . . . the Constitution confers upon every member of Congress, while in attendance within the District, immunity in civil causes not only from arrest, but also from service of process. Neither the Senate, nor the House of Representatives, has ever asserted such a claim in behalf of its members. . . . History confirms that the immunity is limited to arrest.' (293 U.S. 76, Nov. 5, 1934.) The Supreme Court did not pass on the alleged libel. That phase of the case was not before it.

Dec. 10, 1934, Long filed a motion in the Supreme Court of the District of Columbia to quash the summons and service in the libel suit. This motion made no mention of the constitutional immunity clause. It recited that because Long was a resident of Louisiana and here only on official duties, he was 'immune and exempt from service of civil process.'

Long's assassination (Sept. 8, 1935) was soon followed by General Ansell's announcement that no further action would be taken in the libel suit. The outcome of that suit would have proved a most significant precedent.

<sup>1</sup> 'Shielding themselves behind their immunity, many Senators have repeatedly made charges, directly and by innuendo, which would subject the average person to civil and criminal suits. Our politicians are prone to forget that privilege imposes obligations of decency.' Editorial, *Boston Herald*, June 3, 1930.

eration of a nomination in open session, unless the Senate, in any given instance, shall call for its consideration with closed doors. One unfortunate result may be that the expression of doubts, criticisms, or unproved charges, which might be pertinent and even desirable in the confidential consideration of a nomination by a small group of responsible Senators (as was the intent of the Constitution and the practice in the First Congress), may work grave injustice to an innocent nominee and bring grief and humiliation upon his family and friends, if recklessly broadcast in open session by sensation-seeking Senators. The unproved charge may be proved groundless, the innuendo wholly unjustified; but the injury has been done, and constitutional immunity protects those who inflicted it.

On successive days in each branch of Congress resolutions were introduced to put a curb upon members' irresponsible utterances.<sup>1</sup>

Bingham introduced in the Senate a joint resolution, proposing to amend the Constitution in such wise that the section relating to this immunity should read as follows:

They [Senators and Representatives] shall not be questioned in any other place for any speech or debate in either House directly relating to the conduct of any officer of the United States duly elected or appointed, or of any other person acting under the authority of the United States, or of any person having custody of moneys of the United States or receiving such moneys in payment of indebtedness of the United States.<sup>2</sup>

The mover's intent was to allow full immunity to Senators and Representatives who wish to criticize the actions of any officials of the Government from the President down, but to permit 'no immunity for those who make attacks upon private citizens under the cloak of congressional immunity....' Such attacks upon private citizens 'ought to be made with all due regard to the consequences which naturally follow the publishing of criminal libel and defamation of character.'<sup>3</sup>

In the House, Fort introduced a resolution providing for a 'Committee on the Abuse of Privilege in Speech and Debate,' to consist of five members, and to be authorized to hold hearings on the complaint of any person that 'untrue charges, accusations, or statements' had been made by a member speaking on the floor of the House, and to recommend censure or discipline for a member whose words were

<sup>1</sup> It may be not without significance that these resolutions were introduced within forty-eight hours after Blease had refused to appear before the grand jury to substantiate the sensational charges of corruption and inefficiency which he had made against the police department of the District of Columbia on the floor of the Senate.

<sup>2</sup> Dec. 11, 1929, S. J. Res. 106.

<sup>3</sup> Letter from Senator Bingham to the present writer.

found slanderous.<sup>1</sup> In precise compliance with the letter and intent of the Constitution, the member would thus be 'questioned' only on the floor of the body before whom the offensive words had been uttered. With veiled but obvious allusion to the Senate, he declared that the abuse of freedom of speech in Congress 'has grown more frequent as publicity methods have become more and more important to some members of some legislative bodies.' He anticipated that more drastic curbing of speech would come, 'if assassination of character behind the cloak of constitutional immunity does not cease in our legislative bodies.'

#### COMPENSATION

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In the Federal Convention the debate on the compensation of members of the Senate and of the House turned mainly upon the question whether they should be paid by the states from which they came or from the National Treasury. At one stage of the debate, however, another question was raised by a motion that the compensation should be the same for members of both branches. This proposal was vigorously challenged as unreasonable. Some delegates insisted that, as the Senators would be detained longer from home, would be obliged to remove their families to the Capital, and in time of war would perhaps have to be constantly in session, their allowance should certainly be higher than that of the Representatives.<sup>2</sup> The motion for equality of compensation, however, was withdrawn and the provision adopted as follows:

The Senators and Representatives shall receive a compensation for their services to be ascertained by law and to be paid out of the Treasury of the United States.

Accordingly, in the First Congress the Compensation Bill was one of the measures which gave rise to most controversy, for these national legislators were to ascertain not only the amount but the basis of their own payment, and whether it should be the same for members of both branches of Congress. While the bill was in the House, several mem-

<sup>1</sup> Dec. 10, 1929, H. Res. 91.

<sup>2</sup> Elliot, *Debates*, V, 425-27.

bers brought upon themselves charges of demagogery because of their urging that the *per-diem* compensation recommended by the committee be reduced. In the House, Madison and Page advocated that the compensation for Senators be higher because greater service was likely to be demanded of them.

In the Senate the bill was referred to a committee which reported several amendments the most important of which provided that, while the pay of both Senators and Representatives should be six dollars per day until March 4, 1795, thereafter the Senators' pay should be eight dollars per day. Before proceeding with the consideration of this report, the Senate, by a vote of more than two to one, adopted a resolution declaring that there ought to be a discrimination between compensation to be allowed to Senators and to Representatives. This gave rise to a long, angry debate.<sup>1</sup> In his *Journal* Maclay declared that 'the doctrine seemed to be that all worth was wealth, and all dignity of character consisted in expensive living.' Against this he made angry protest and brought upon himself a storm of abuse by moving that the pay be reduced to five dollars per day. Carroll, the richest man in the Senate, supported Maclay. Vice-President Adams became so excited that he could not keep his seat; three times he interrupted Ellsworth, asking him if the dignity of the Senate was to be settled by the people, and if the old Congress had not degenerated for want of sufficient pay. The House refused to accept any discrimination in pay. After conference, the bill as finally passed provided for a *per-diem* payment of six dollars to Senators and to Representatives until March 4, 1795.<sup>2</sup> In 1795, the compensation was increased to seven dollars for the ensuing year, but at the end of that period it was reduced to six dollars, at which figure it remained for the next twenty years.

<sup>1</sup> Page 74.

<sup>2</sup> Maclay (*Journal*, 131–33; 136–38) gives light on Senators' living expenses in New York during the First Congress. At one time, 'I settled for my boarding at \$4.00 per week,' including 'the services of the boy' (July 19, 1790). A few months later he reported 'the rate of boarding' as '3.00 per week exclusive of fire wood' (Dec. 18, 1790). In the first years in Washington, Plumer reckoned that members of Congress were in session on the average of not more than 135 days in the year and that the six dollars *per-diem*, or about \$810 a year, 'seems little more than supports them here.' (*Memorandum*, 90, Dec. 15, 1803.)

By a contract, dated June 1, 1789, Senator Langdon's factotum agreed: 'To live with him for 12 months in the capacity of a servant, to drive the carriage as coachman, take care of horses, tend at table, or any other business about the house whatever. . . . I hereby engage to act with industry and integrity, and take care of his interest, for all which the sd. Langdon is to pay me four dollars per month wages — in supplies of clothes and other things or cash.' *John Langdon of New Hampshire*, by Lawrence Shaw Mayo (1937).

By 1816, the cost of living had risen to a point that made some increase in the pay of members of Congress entirely reasonable. But the grounds on which an increase was then urged were not convincingly presented. The sponsor for the new bill in the House of Representatives argued that the payment of an annual salary of \$1500 in place of the *per-diem* six dollars would be beneficial because it would shorten the session; it would give members greater compensation if they acted with industry; and it would save money to the Government, in the cost of fuel and attendants for the shortened session. The bill was passed by the House within forty-eight hours of its introduction. In the Senate it received more consideration, but in less than a fortnight after it was sent up to the Senate it became a law, calling for an annual payment of \$1500 and made retroactive for more than a year. The Act provoked universal condemnation, which made itself evident, not merely in harsh criticism, but in the defeat of a large proportion of the members who were up for re-election.<sup>1</sup> So great was the resentment that the law was speedily repealed. In 1818, the *per-diem* was raised from six dollars to eight dollars, at which figure it remained for many years.

In 1830, a Senate committee reported that the pending House joint resolution proposing to substitute an annual salary for the *per-diem* was designed not so much to regulate the compensation of members as to 'create such penalties for negligence of duty as will insure their attention in their respective Houses,' and to compel the amendment of the rules of each House so as to effect that object. In self-righteous mood, the committee declared that they knew of no necessity for such action in the Senate, and that, if such necessity should arise, it should be dealt with directly by the Senate. Accordingly no action was taken by the Senate on this resolution.<sup>2</sup>

In 1856, there was substituted for the eight dollars *per-diem* an annual salary of \$3000, and its payment was made retroactive for the

<sup>1</sup> At the opening of the next session it was found that nine members had resigned in disgust, and that all of their places had been filled by the choice of men hostile to the Compensation Act. Both McMaster (*History*, IV, 357-62) and Henry Adams (*History*, IX, 138) considered this punishment unreasonable and harmful, for in their opinion it was the ablest and most useful Congress which had yet assembled under the Constitution, and the increase in compensation was justified.

<sup>2</sup> In 1842, Benton took a dramatic method of forcing attention to the Administration's attempts to 'obtain a paper-money currency,' by having recourse to Treasury notes with the quality of reissuability attached to them. A check for \$142 for his *per-diem* attendance in the Senate he endorsed 'The hard, or a Protest.' The notary, whom he sent to the bank to cash it, was told that the Secretary of the Senate had deposited only Treasury notes for the payment of such checks, but he was tendered \$100 in gold and the rest in paper. The check was protested. Benton brought the papers into the

entire session. Ten years later in the days of 'greenback inflation,' the salary was advanced to \$5000.<sup>1</sup> Payment was made retroactive to March 4, 1865. On the day before its final adjournment, March 3, 1873, the Forty-Second Congress passed an appropriation bill upon which had been tacked a rider raising the pay of Senators and Representatives from \$5000 to \$7500 a year. There was justification for such an increase, and the precedents were consistently on the side of making such legislation retroactive; but this Act made the new scale of payment apply to the entire two years of the expiring Congress, the members thus voting to themselves a bonus of \$5000 each for work done during the past two years. This 'salary grab' met with universal condemnation, 'its back-pay steal' being especially obnoxious. So heavy was the storm of reproach that quite a number of Senators and Representatives paid back into the Treasury the bonuses which they had received under this Act.<sup>2</sup>

On the first day of the next session there was an unseemly scramble 'to introduce bills to repeal the salary clause.' In the House, not less than twenty-five such bills were introduced in a row, and the salary was speedily reduced to \$5000.<sup>3</sup>

Senate, and made them the basis of moving an investigation into 'the method of payment now made or offered to be made by the Federal Government to its creditors.' This practical demonstration proved sufficient; 'the forced tender of paper money was immediately stopped.' Benton, *Thirty Years' View*, II, 406; *Cong. Globe*, 210, Feb. 4, 1814.

Nearly ninety years later, another 'Administration was persistent in its attempts to obtain a paper-money currency,' despite the fact that then, as in 1842, the stock of gold and of well-backed notes in the country was exceptionally great. It might have clarified the situation somewhat if some Senator had been minded to follow Benton's example — to 'make a case for the consideration and judgment of Congress and of the country' by demanding 'the hard, or a protest' in payment of the interest or principal of a United States gold bond, and by bringing the documents into the Senate. An ex-Senator (Thomas of Colorado) made public announcement of the fact that he held about \$110 of gold coin, and he practically invited the Attorney-General to come and get it.

<sup>1</sup> July 28, 1866.

<sup>2</sup> Of the 74 Senators, 24 returned back pay to the Treasury, and of the 252 members and delegates of the House less than 50 returned back pay, or about one-third of the Senators, and less than one-fifth of the Representatives. No state on the Pacific or of the Southwest or South (except Maryland) returned anything. (W. B. Parker, *Justin Smith Morrill*, 243.) Some members devoted their back pay to education or other purposes. For example, George F. Hoar, then a Representative, gave the entire sum which he received as back pay, both principal and interest, to the Worcester Polytechnic Institute, to found a scholarship available for students from certain towns in his Massachusetts district. This salary grab is discussed at length by James Ford Rhodes, *History*, VII, 20 ff., and by T. C. Smith, *Life of James A. Garfield*. Garfield at that time was Chairman of the House Committee on Appropriations.

<sup>3</sup> How strong from the very beginning of the Government had been the feeling that it was improper for members of the national legislature to vote increases of salary in which they should at once be beneficiaries is shown by the fact that in 1788 the conventions of three states accompanied their ratification of the Constitution by resolutions that it be at once amended to prevent such action, and among the twelve amendments passed by

Not till 1906 did the increase of members' salaries again come before Congress for serious consideration. So noisome had the phrase 'salary grab' become in our history that even those who emphasized the inadequacy of the salaries, still paid at the rate which had been fixed more than forty years before, hesitated to advocate a substantial increase, certain to incur popular disapproval. Each branch of Congress seemed disposed to put upon the other the blame for the change which both desired. In the House, after the increase had been under consideration from time to time for many months, the amendment providing for an increase of salary from \$5000 to \$7500 was passed by a sizable majority, but without a yea-and-nay vote. In the Senate the measure was amended to provide that the increase should begin only after the next congressional election; but the House insisted and the Senate finally concurred, with the result that the increase became effective March 4, 1907, for the entire membership of the sixtieth Congress which had been elected in 1906 on the basis of a salary of \$5000.

In 1925, the Senate took the initiative in the move for salary increase by putting a rider upon the Legislative Appropriation Bill, which provided that a month later, at the beginning of the term of the sixty-ninth Congress, the salaries of Senators and Representatives should be increased from \$7500 to \$10,000. Upon the amendment there was not a word of debate, and the vote was taken unexpectedly at an evening session, when several members known to be strongly opposed to the proposal were absent, as it had not been supposed that this measure could be reached at that time. Norris tried in vain to secure its recall from the House. That body passed it by a majority of more than two to one, after only half an hour's debate and without a record vote.<sup>1</sup> The bill reached the President so late in the two-thirds vote in each branch of the First Congress and submitted to the states was the following:

No law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of representatives shall have intervened.

This proposed amendment was approved by a majority of the states voting, but not by the required three-fourths, and thus failed of ratification.

At the opening of the next Congress after the passage of this 'Salary Grab' Act, five amendment proposals similar to that of the First Congress were immediately introduced. The Ohio Senate passed a vote ratifying in 1874 the amendment which had been submitted by Congress in 1790. H. V. Ames, *Proposed Amendments to the Constitution*, 34-35.

<sup>1</sup> One member declared: 'It is my very best judgment that if we can muster enough votes to secure a roll-call, we can defeat the Senate amendment.' Five days were given to members in which they might 'extend their remarks in the *Record*', and some ten pages (4266-76) were filled with their 'speechless speeches.' Many based their opposition upon the fact that in their recent campaign they had sought and won re-election upon the understanding that the salary would continue to stand at \$7500.

session that he could not merely let it become a law without his signature. The bill placed President Coolidge in a peculiarly embarrassing dilemma. It ran counter to the economy program which he had been diligently urging. He had blocked similar increases of pay for other federal officers, and as Governor of Massachusetts in a stinging message he had vetoed a bill by which the members of the legislature sought to increase their own pay.<sup>1</sup> But to veto the present bill would have held up or prevented many much-needed appropriations. Within a few minutes of the expiration of the Congress, the President signed this bill which was to add about \$1,350,000 to the annual expenditure for congressional salaries.<sup>2</sup>

By the Emergency Act of March 20, 1933, the compensation of Senators and Representatives was temporarily reduced to \$8500.

#### CLERK HIRE

For nearly a century the Senate made no provision for clerical assistance at public expense for its members, unless they were chairmen of committees. In 1884, for the first time it was voted to allow

<sup>1</sup> The increase was from \$1000 to \$1500 a year, and retroactive. (*Messages to the General Court*, 96-98; 1919-20.) It was passed over the veto, and added \$142,000 to the cost of the government.

<sup>2</sup> While the bill was in the President's hands, by a probably unprecedented procedure an attempt was made to annul the salary increase. Earnest debate developed over a motion to suspend the rules, as a first step toward that end. It was lost, but the yeas-and-nays vote (18 to 64) on this motion virtually placed Senators on record upon the main question.

As in 1873, when Senators and Representatives who had disapproved of the 'salary grab' refused to profit by it, so in 1925 a number of members of both Houses returned to the Treasury the surplus over the salaries in contemplation at the time of their preceding elections. Comptroller-General McCarl ruled that the rate of pay fixed by law must be accepted, otherwise heirs or representatives of any member declining a part of his pay might at any time make a claim for it; he added, however, that there was nothing to preclude members from returning any part of their salary as an acquittance to the Government. (Letter to the Sergeant-at-Arms of the House, who had sought instructions as to what he should do when a member declined to accept the increase. Press comment, March 22, 1925.) For the five years until he was next re-elected, Senator Borah thus made 'acquittance' of \$2500 annually to the Government.

For years after the ratification of the Sixteenth Amendment some lawyers of high repute as authorities upon the Constitution expressed the view that if members of Congress are 'state officers,' their salaries (like those of governors and mayors) should be held exempt from federal income taxation, and that a Supreme Court decision might result in a refunding of the payments which for years had been paid by them upon that item of their incomes. A test case seems never to have been brought to a federal court. The Office of Commissioner of Internal Revenue, however, has held that the compensation of United States Senators and Representatives is subject to federal income taxation. The most pertinent citation is *Lane v. McLemore* (169 S.W. 1073), in which the Texas Court of Civil Appeals held that a Congressman-at-Large (and by analogy a Senator) was not a state officer, but a federal officer. (Reply to the writer from Office of Commissioner of Internal Revenue, Aug. 5, 1932.) See Senate's decision in Nye case, p. 165.

each Senator, not a committee chairman, to employ a clerk, during the session of Congress, at six dollars a day, to be paid from the contingent fund of the Senate.<sup>1</sup> From that modest beginning the Government's expenditure for Senators' clerical assistance during the past half-century attests not only the growth in volume and complexity of the service which the Senator is expected to render, but also, it may be, the Senators' co-operative pressure to secure a large enough appropriation for clerk hire so that each Senator's office may be effectively manned as a political headquarters.

The clerk quota for each Senator who is not a chairman of certain designated committees is identical in number, in grades, and in salaries. For the office staff of each such Senator, by the Legislative Appropriation Act for the year ending June 30, 1933, there were thus allotted one clerk at a salary of \$3900, and three assistant clerks at salaries of \$2400, \$2200, and \$1800, respectively<sup>2</sup> — an aggregate of \$10,320 for the office staff of each such Senator.

'This is a Senate of equals.' 'No State, without its own consent, shall be deprived of its equal suffrage in the Senate.' This saying of Webster's and this provision of the Constitution are dear to the Senators from the small states, to whom 'equality' seems to imply that there should be no discrimination between Senators as to the facilities with which they shall be provided. But in the allotment of clerical assistance equality produces gross inequality. The same office staff at the uniform salary scale is assigned to each Senator who is not a committee chairman — whether he represents Nevada with a population of 91,058, or New York with a population of 12,588,066. The burden of business to be handled in the service of such immensely different constituencies makes such an allotment absurd, unjust to Senators from the larger states, and detrimental to the public interest. In Senate debate (March 14, 1924) it was declared that at that time a Senator from New York (Copeland) and both Senators from Pennsylvania were paying out from their own pockets far more than their own

<sup>1</sup> For years the Senate's attempts to get the burden of this payment shifted from its own contingent fund to the Legislative Appropriation Bill were successfully resisted by the House, until provision could be made in that bill for clerk hire in the office of every Representative.

<sup>2</sup> Senators who are committee chairmen may direct a much larger staff. By the law it is provided that their own clerks and assistant clerks shall be *ex-officio* clerks and assistant clerks of their committees, each of which may have other clerks and experts. For example, the Committee on Appropriations in 1933 had a staff of nine, at \$31,340; Finance, ten, at \$29,220; Foreign Relations, six, at \$15,160. In each case the chairman's secretary was clerk of his committee.

salaries for extra clerical help (in addition to the clerks provided for them by Congress).<sup>1</sup>

But service in Congress involves largely increased expenditure, especially for the Senator who maintains a home for his family in Washington as well as in his own state. As a result, many a Senator finds that — inasmuch as his duties in Congress largely preclude the regular carrying on of his business or practice of his profession — his actual net income is substantially reduced.

Clerk-hire allowances, however, may make it possible that the income of the family as a unit is increased to comfortable proportions. Each Representative is allowed the sum of \$5000 a year 'for Clerk Hire necessarily employed by each Member . . . in the discharge of his official and representative duties.' In some congressional families this allowance is evidently looked upon as a welcome addition to the family income. The persons thus 'employed' do not go upon the payroll of the Government as its direct employees. Each month payment is made to such persons and in such amounts as the member may designate. Under such conditions many Representatives secure within their own families the most confidential and efficient of clerical assistance, but the opportunity for sheer nepotism, if not its practice, is a matter of frequent comment.<sup>2</sup>

<sup>1</sup> There was under discussion at the time a resolution that to each Senator (not chairman of a committee to which additional clerks had been assigned) from a state having in 1920 a population of over 5,000,000 there should be allowed a special assistant clerk, at the rate of \$2400 a year, the salaries to be paid from the Senate's contingent fund, and the clerkships to continue during the 68th Congress.

Pepper (Penn.): In addition to the allowances made by the Government, during the last two years I have paid out of my own pocket \$10,250 for clerical salaries.

Willis (Ohio): Last week I sent out from my office in one day 1200 pieces of mail, about 1000 of which I signed myself.

Reed (Penn.): I know that my clerks are working nights and Sundays and that they are unable physically to keep up with the strain, and I am unable financially to hire any more clerks.

Copeland (N.Y.): The mail coming to my office, I am told, is the largest ever sent to a Senator's office. It is utterly impossible for the staff provided by the Government to take care of that mail. It is utterly impossible for me to hold the office and do any credit whatever to it unless I can answer the letters coming to my office. I am already hiring all the help I can afford to hire, and yet I have not help enough.

Senator Fess (Ohio, a member of the Committee to Audit and Control the Contingent Expenses of the Senate), writes: 'While the proposal to graduate clerk hire of the Senate with the population of the States represented by the Senators is equitable and entirely justifiable, it will not likely ever receive favorable consideration.' (Letter of Aug. 12, 1932, to the writer.) Provision of additional clerical assistance for Senators needing it 'until the end of the present session' was made. April 5, 1934, *Cong. Rec.*, 6077.

<sup>2</sup> In accordance with the Warren 'anti-nepotism' resolution, passed by the House, May 20, the April (1932) payroll for 'Clerk Hire' was opened to public inspection. It was found that 100 of the members were employing 'clerks' of their own names. Six Congressmen had two 'namesakes' on their lists. (*Cong. Rec.*, 10813.) It was noted that the wife of the floor leader had been receiving \$2500 a year as his secretary, while

In the Senate, on the other hand, the salaries of the different grades of clerks and assistant clerks are specified by law, and each such clerk, though designated by the Senator, is paid directly as an employee on the Government's payroll. Senators frequently discover within their own family circles exceptional capacity for expert clerical service. Thus, in 1932, of the salaries aggregating \$10,300 paid to the four members of the clerical staff in Brookhart's office, salaries of \$3900 and \$2200 were being paid to a son and a daughter.<sup>1</sup>

#### EKING OUT THE SALARY

Lawyers — who constitute the largest element in the membership of the Senate — find that service in that body brings serious interruption to their practice, but also many contacts which are of advantage both during their terms of service and later. Henry Clay, who by appointment first entered the Senate before reaching his thirtieth birthday to fill a vacancy for only three months, chose not to be a candidate for the next Congress, believing that it would materially injure his business. ‘But it was very convenient, and a money-getting business, to him, to attend this session.’<sup>2</sup>

the Speaker's wife had been receiving \$3900 and his son a monthly salary of \$91.66. (A few days before the actual publication of the list, this son had been taken off the payroll.) In the following election campaigns these figures received a good deal of attention, and in the 73d Congress there was a considerable shrinkage of the names of members' relatives on the payroll. Nevertheless, some 60 such names still remained, headed by the Speaker's wife at a secretary's salary of \$327.25 a month. In a speech in the House, favoring an anti-nepotism bill, Mitchell cited startling instances of nepotism on the part of Senators. In one instance three of the five clerks on the list of a trans-Mississippi Senator were near relatives: one of them, a brother-in-law, drew a salary of \$2200, while serving as president of a bank in his home city, a thousand miles away. At one time this Senator was carrying on his clerk list at a salary of \$2580 his aged mother-in-law, who did nothing to earn the pay, but lived with a son in a distant city. When criticism was attracted to this situation, he removed her from the payroll, and appointed as clerk in her place the wife of a nephew who was also a clerk in his office. Referring to Brookhart's record, mentioned below, and to the fact that he was at that moment holding an appointment in the Department of Agriculture, Mitchell commented: ‘I know no reason why this nepotic Republican, who drew \$25,000 through himself and family, should be rewarded with any Democratic patronage.’ June 2, 1934, *Cong. Rec.*, 10333–36.

<sup>1</sup> In the Iowa primaries of 1932 the voters were much interested in the coincidence that, in addition to the salaries of the Senator and of the son and daughter in his office, another son was Commercial Attaché at Bangkok, Siam, at a salary of \$5400, while two brothers were officers of a Federal District Court in Iowa — an aggregate payment by the Federal Government to that group of Brookharts of \$24,750. *Time* (May 30, 1932), 10.

<sup>2</sup> Plumer, *Memorandum*, 565, Jan. 11, 1807. ‘His clients who have suits depending in the Supreme Court of the United States which is to sit here next month gave him a purse of \$3000 to attend to said suits.’

Senators may carry on a very lucrative private practice.<sup>1</sup> The ethics of the profession and legal restrictions prevent Senators' appearing in suits in any way against the United States, or using their influence improperly before any government agency.<sup>2</sup> Contacts established while in Congress and special knowledge acquired in committee work give Senators an intimate understanding of many problems in which the Government comes into conflict with private interests. Rarely have Senators been charged with improper use of their knowledge and influence, and most Senators whose conduct has been a matter of formal investigation have been exonerated. After retirement an ex-Senator may find his most lucrative legal practice in representing corporations in litigation with the Government. In some cases Senate investigating committees have tried with little success to draw a line between such practice which is entirely legitimate and creditable and that which is to be condemned as 'pernicious lobbying.' When nominated for high positions in the federal service, ex-Senators may find the character of their legal practice after leaving the Senate a matter of sharp criticism by their former colleagues.<sup>3</sup>

<sup>1</sup> In 1911 surprise was expressed when Judge James A. O'Gorman resigned his seat upon the Supreme Court Bench of New York, with its term of fourteen years and salary of \$17,500, for the chance of election to the Senate, with term of six years and salary of \$7500. After a deadlock of several weeks in the legislature, he was elected. He became the head of a New York law firm, and within a few months of his entering the Senate he appeared in an important litigation. It was common report that his personal compensation from that one case would make up the difference between the two salaries. (Press report, June 28, 1911.) Soon after entering the Senate, Hiram Johnson (Cal.) received \$25,000 for serving as special counsel for the City of New York in traction litigation.

<sup>2</sup> See *Burton v. U.S.*, 202 U.S. 344; *In re Chapman*, 106 U.S. 661; *Anderson v. Dunn*, 6 Wheat. 204.

<sup>3</sup> In response to a Senate resolution of inquiry, the Secretary of War transmitted to the Senate the names of three former members of the Wilson Cabinet, four former Democratic Senators, and eight former Representatives who, within two years after retiring from those offices, had appeared, either in person or through their law firms, in cases before that Department. Press report, April 24, 1927.

April 17, 1934, there was a spirited debate in the Senate on 'Service of Members of Congress as Attorneys' (S. 2018). When this bill was reached on the calendar, objection was raised to its consideration. On Borah's motion to proceed to its consideration, notwithstanding the objection, the vote was a tie—31 to 31. 'The Vice-President votes *yea*, and lays the bill before the Senate.' It read thus:

Be it enacted, etc.: That no Senator, Representative or Delegate in Congress, after his election and during his continuance in office, shall receive, or agree to receive any compensation whatever, directly or indirectly, for services rendered to, or to be rendered to any person, corporation, association, either by himself or another... in relation to any proceeding, contract, claim, controversy, charge, accusation, or arrest, or other matter or thing in which the United States as a party is interested.

This evoked very frank discussion. Borah and Logan favored the bill. It was opposed by Barkley, Bone, and Long, as curtailing a man's right to earn a living by his profession. Debate was cut short by the end of the 'morning hour' at 2 P.M., when, as required by the rules, the Chair laid before the Senate the unfinished business. (*Cong. Rec.*, 6931-64.) During the rest of that session of Congress there was no debate nor vote upon this bill.

Prestige won in Senate debate or committee often brings to a Senator legal engagements at high fees in sections where his legal practice might not otherwise have extended, particularly in litigation where a state or a city is involved. A Senator's reputation as an orator or his special knowledge or zeal in regard to some particular governmental issue may make him much in demand as a public speaker. When the subject is one upon which legislation is pending, the speaker may put himself in equivocal position, by seeming to bind himself to vote in a definite way, no matter in what modified form the issue should later come before the Senate.<sup>1</sup>

Following the absurd precedent set by Bryan, who while Secretary of State appeared as a speaker in vaudeville programs upon the Chautauqua circuit, some Senators deliberately plan to eke out their incomes by going on tour as lecturers.<sup>2</sup>

#### MILEAGE

In the very first law making appropriation for pay to members of the Senate and of the House, it was provided that at the beginning and end of every session six dollars should be paid for every twenty miles of estimated distance by the most usual road from the member's place of residence to the seat of the Government.<sup>3</sup> One of the first reports as to

<sup>1</sup> In the investigations by the Senate 'Slush Fund Committee,' it was brought out that eight of the most prominent 'dry' champions in Congress — four of them were Senators — were on the payroll of the Anti-Saloon League, receiving 'honoraria' from that organization for the prohibition speeches which they were making throughout the country. This practice was criticized as contrary to the rule that Congressmen shall not financially benefit from any institution concerned with pending legislation. Press reports and editorial comment of June 18, 1926.

<sup>2</sup> Lawyers and orators are not the only Senators to whose words the prestige of their office may give an increased money value. One Senator in newspaper advertisements frequently attests the beneficial qualities of a certain mineral water, and a milling company makes his 'Weekly Health Hints' widely available by radio. A few years ago the portraits and facsimile signatures of four Senators accompanied in newspaper advertisements their testimonials to their several favorite brands of cigarettes.

Some years ago a Senator's wife made a room in her husband's suite in the Senate Office Building her business headquarters, from which was carried on a country-wide correspondence, soliciting orders for the products of her plantation. The letters were signed by her 'secretary,' who chanced to be one of the Senator's clerks.

In 1932, in campaigning for renomination, Brookhart advocated a limitation of salaries to \$10,000. His opponents laid stress, not only on his gross nepotism, but also on his conception of faithful public service. Between May 1 and July 22, 1930, the Senate was in session forty-nine days. On only eight of those days does the *Record* give any evidence of Brookhart's presence. Out of thirty-nine yea-and-nay votes he was recorded as voting on only seven. On only four days, did he speak. On the other hand, while the Senate was busily engaged on measures of great moment, Brookhart was reported to be filling a long series of Chautauqua lecture engagements in many states far from Washington. He was defeated for the Republican nomination, and a Democrat was elected.

<sup>3</sup> Act of Sept. 22, 1789.

the allowances for attendance and mileage gave rise to critical comments. Maclay noted: 'Johnson [then a Senator from Connecticut, and President of Columbia College in New York City] was allowed full pay and mileage to Connecticut, though he lives here. Honesty thrives but badly east of the Hudson.'<sup>1</sup>

By successive Acts this mileage rate was continued till 1818, when it was increased to forty cents. In 1866, it was provided that the allowance should be reckoned at twenty cents a mile, going to and returning from each regular session. Garfield's efforts to defeat the 'salary grab' of 1873 accomplished nothing more than the concession that the only allowance in addition to the increased salary should be 'the actual individual traveling expenses to and from the seat of Government, once for every session.' But when the new salary law was repealed (1874), the mileage allowance was restored, and at twenty cents a mile it continued to stand, for nearly sixty years, regardless of the great variations that have developed in actual travel costs.<sup>2</sup>

In the House bills were repeatedly introduced to reduce the mileage rate. These were usually smothered in its Committee on Mileage; if they reached the Senate, they were invariably rejected. Advocates of reduction argued that the member's actual transportation expenditures, within certain limits, were what should be allowed.<sup>3</sup> Others insisted that the twenty-cent mileage was meant as a part of the member's compensation.<sup>4</sup>

The Senate has twice sought to amend the law as to mileage so as to

<sup>1</sup> *Journal*, 229, April 3, 1790.

<sup>2</sup> 'By the nearest route usually traveled in going to and returning from each regular session.' (14 Stat. 323.) By the Emergency Economy Act of 1933, mileage was temporarily reduced to fifteen cents a mile.

In his single term in Congress Horace Greeley took a newspaper man's delight in getting access to the list of mileage charges and publishing them. In debate he called attention to such examples as that of one of the Representatives present whose travel by the nearest post route would have been 1053 miles; by the usual post route, 1407 miles; but whose 'congressional mileage' had been 2330 miles! He urged an amendment providing that mileage be computed by the shortest mail route between the Representative's home and Washington and return. (*Cong. Globe*, 370-71, Jan. 25, 1849.) Attention has often been called to the anachronism of the twenty-cent mileage allowance of 'stage-coach days' in the twentieth century. But the member rejoins that there is little or no margin, when fares of wife and child and excess baggage have been paid. See *Cong. Rec.*, LIII, 3432, and 67th Cong., 1st sess., H.R. 224; 2460.

<sup>3</sup> See debate, March 2, 1916, on a proposal to reduce the mileage to five cents — the rate then allowed to witnesses going to and from federal courts.

<sup>4</sup> 'If he [the member] is married, as he ought to be, and brings his wife and children, as he ought to do, he loses money frequently on the mileage drawn.' (Barnhart, *Cong. Rec.*, 3434.) He favored the payment of the actual travel cost for the member, his wife and his clerk.

include for each member a reimbursement from the contingent fund of Senate or House for a clerk's travel expenses for one round trip for each session to and from Washington and the member's residence, but the House did not agree to such amendments.<sup>1</sup>

The mileage allowance is 'for two sessions only.' It is paid at the beginning of each regular session of Congress.<sup>2</sup> Occasionally Congress has voted itself mileage for special sessions, but in recent years leaders in both branches have taken a pronounced stand against voting for a mileage allowance when a regular and a special session are practically continuous.<sup>3</sup>

#### THE SENATOR'S FRANKING PRIVILEGE

With the exception of one interval of a few months, from 1792 until the present writing Senators and Representatives have been privileged under their individual franks to send free through the mails any mail matter to any government official, and to send to any person correspondence not exceeding a specified weight 'upon official or departmental business.'<sup>4</sup> They are also permitted to receive or send free through the mails 'all public documents printed by order of Congress.'

How valuable this privilege may prove depends upon the interpretation which Congress or the Post Office Department shall place upon what is frankable. In 1913, a Senator asked that a certain speech by Bailey, made in the Senate, January 2, be printed as a public document. Smoot at once objected, stating that the Joint Committee on Printing uniformly refuse to have printed as a public document any speech delivered in either House of Congress for the reason that if that were permitted, any member of either House could make a speech

<sup>1</sup> In 1929 and 1930. The sponsors for this proposal acknowledged that they had made no effort to secure an estimate of what additional appropriation would be required to provide the round-trip traveling expenses for some 550 clerks.

There is obvious advantage to the public as well as to the Senator in his having at hand, during the months when Congress is not in session, a clerk skilled in handling his official correspondence, but the cost of the round trip between Washington and the Senator's home in many instances would prove prohibitive. Sometimes a Senator or Representative makes public announcement through the press of the name and address of a 'home secretary' in his own state, whom constituents may consult in person throughout the year upon matters which they wish to have brought to the attention of the Senator in Washington.

The appropriation for mileage of Senators for the fiscal year ending June 30, 1933, was \$51,000.

<sup>2</sup> 11 Stat. 48.

<sup>3</sup> For debate on President Roosevelt's preposterous 'constructive recess,' see pp. 775-76.

See debate in House, Nov. 21, 1922, *Cong. Rec.*, 18.

<sup>4</sup> The weight is now four ounces. The franking privilege was done away with in 1873, but restored a few months later.

upon any subject and have it not only printed in the *Record*, but printed as a public document, and sent, without expense to himself, to any part of the country he saw fit. Any speech made in Congress appears as a matter of course in the *Record*, and the Public Printer is required upon order of any member to print and deliver to him 'extracts from the *Congressional Record*' in such quantities as the Senator may desire, he paying the cost thereof. But even this slight cost could be put over upon the Government, if permission could be secured for the printing of the speech as a 'public document.'

Nomination by direct primary elections has converted the franking privilege into 'a vehicle of purely political service.'

By means of it a Member, with little or no expense to himself, may circularize his district (or State), asking all voters to indicate such bulletins, documents or seeds as they may desire. To facilitate answers, franked and addressed envelopes may be enclosed. The supplies are then forwarded under frank. In other words, a Member's clerk becomes the head of a campaign bureau, with the hope that franked favors may induce grateful constituents to remember the sender on primary and election days. Moreover, political documents and party appeals, once published in the *Record* immediately become frankable, and, whether printed at Government or private expense, may be sent out by the ton from any political headquarters.<sup>1</sup>

In September, 1916, Curtis had read into the *Record* a letter which had been sent under the frank of an Arizona Senator to some sixty thousand of his constituents. Printed under the heading: 'United States Senate, Committee on Indian Affairs,' it was addressed to 'My dear Friend and Constituent.' Beginning: 'It is but proper that I should render to the people of Arizona some account of my record as a United States Senator,' he proceeded to set forth that record in appreciative terms, and the reasons why he should be re-elected. When this episode was thus brought to the attention of the Senate, the author of the letter explained that he had submitted this communication to the Postmaster-General and the Third Assistant Postmaster-General, both of whom had ruled that it was frankable ('correspondence upon official or departmental business') and that he had 'paid for the printing of this letter some \$146 and had made his return' of this expenditure.<sup>2</sup> Curtis replied that he had already stated to the Senate

<sup>1</sup> De A. S. Alexander, *The House of Representatives*, 152.

<sup>2</sup> *Cong. Rec.*, 13916-19, Sept. 6, 1916.

that this communication had been officially held frankable, but he added: 'I simply questioned the good judgment of the Postmaster-General.... It is now in the *Congressional Record*, and the Senator can take it from the *Record*.' For a Senator or Representative who has qualms as to the propriety or doubts as to the legality of sending directly under his frank a purely electioneering appeal to his constituents under guise of 'official business' this remains as the most available and least (personally) expensive form of electioneering. All that is necessary is to go through the perfunctory performance of requesting permission to 'extend his remarks.' Then into the Appendix of the *Record*, with no limitation upon its length or its purely personal and private advantage, goes his bid for votes. When once it has found a place in that 'catch-all,' no question is raised as to its frankability.<sup>1</sup>

It is evident that the franking privilege is of tremendous advantage to the candidate who can use it on his own behalf, or for whom it can be used by his political managers. It has been stated that in the presidential campaign of 1928 there were sent free through the mails 560,000 copies of Heflin's speeches (he called them 'Lectures') in opposition to one Democratic candidate, 760,000 copies of a speech by Representative Burton in favor of one Republican candidate, and 490,000 copies of a speech by Representative Brand in favor of another Republican candidate.

At the beginning of the campaign of 1932 one request after another was made for the printing in the *Record* of political speeches, especially those of Cabinet members. Several Senators protested against this practice. Asserting that it costs \$58 to print a page in the *Record*, Reed suggested that 'we make an agreement now that no political

<sup>1</sup> In the Appendix of the *Record* at the end of the first session of the 72d Congress, July, 1932, appeared not less than four such direct appeals to their constituents by Congressmen seeking re-election, under the guise of 'extension of remarks' addressed to 'Mr. Speaker.' The most dilute of these covers seven and a half pages, takes the voters of the Congressman's district into his confidence as to his hopes for a committee chairmanship carrying 'about \$4000 a year committee clerical appointments, which I could give to my friends'; and as to the chairmanship and the vice-chairmanship which are to be his, 'when the Democrats win this fall.' Not the least amusing feature of his 'extended remarks' was his statement of intention to 'have hundreds of thousands of different pieces from the *Record* printed in my district, paid for there, mailed under frank there, and delivered there, all nearly a thousand miles from Washington.... Uncle Sam did not pay a single extra red cent for or on account of this transaction. The expense is running....' And the start of the 'running' was the getting of a political advertisement into the *Record's* Appendix under guise of 'extension of remarks,' with various interjections of 'Mr. Speaker' (who never heard a syllable of what followed) at a cost to Uncle Sam of some \$350.

speeches be put into the *Record*. The taxpayers are entitled to protection against our using the *Congressional Record* for campaign purposes. Unless something of this sort is done, the *Congressional Record* will simply bulge with political speeches.<sup>1</sup>

In the fiscal year ending June 30, 1931, members of Congress mailed free under the franking privilege 33,413,032 pieces — a weight of 4,385,007 pounds — which at the usual postage rates and including registry fees would have yielded to the Government a revenue of \$723,671.<sup>2</sup>

The franking privilege now covers opportunities which the framers of the Constitution could not imagine. The Government each year pays large amounts for telegrams sent by Senators or sent 'collect' to Senators. Such telegrams are supposed to be concerned with the official business of the Senator.<sup>3</sup> Telephone service, aside from Senators' long-distance calls, represents a charge of many thousands of dollars upon the Senate's contingent fund.

Public documents are frankable, and in enormous tonnage they are sent free through the mails. Each Senator, for example, has the distribution of 88 subscriptions to the *Congressional Record*. Until recently, for many years quotas of seeds costing hundreds of dollars were allotted for distribution by each member of Congress under frank among his constituents.<sup>4</sup> The largest 'crop' anticipated from the documents and the seeds in most cases was probably in the form of votes on the next election day.

There is frequent criticism of abuse of the franking privilege.<sup>5</sup> Congressmen say that the privilege is 'primarily for the benefit of our citizens,' enabling them to secure public documents and information

<sup>1</sup> *Cong. Rec.*, 15418, July 15, 1932.

<sup>2</sup> *Report of Postmaster-General*, 45, Nov. 2, 1931.

<sup>3</sup> Ashurst's record, early in his service, of telegraph charges of \$100 in a single day, figured more than once in congressional debates. But a member of the Committee to Audit and Control the Contingent Expenses of the Senate declared that in his opinion the telegrams were 'unquestionably sent on official business,' since they related to the appointment of a judge of the United States Court. The Senator was seeking advice from representative men in Arizona as to whom he should suggest to the President for nomination. *Cong. Rec.*, 13919, Sept. 6, 1916.

<sup>4</sup> 'The whole thing of sending out these seeds has become a howling farce.' (Kenyon, in Senate speech, March 5, 1918.) Four years later the Senate struck out a provision of \$360,000 for free distribution of seeds by a vote of 29 to 24, but later restored it by a 31 to 30 vote.

<sup>5</sup> The frank may be used to the advantage of private interests as well as in aid of personal political ambitions. A prominent Senator recently found it embarrassing to answer an investigating committee's inquiries as to the distribution under his frank of thousands of copies of an expensive pamphlet filled with effective propaganda in favor of a high tariff on sugar. Alleged cost to the U.S. Treasury, \$28,000.

upon a tremendous range of subjects, without the annoyance of having to enclose return postage. Congressman J. W. Summers writes:

One hundred and twenty-five million citizens are served in this way by 531 Senators and Representatives in Congress at an average cost to the Postoffice Department of less than \$1000 per year per member. The Congressional franking privilege for all these purposes amounts to one fifteen-hundredth of postal expenditures.<sup>1</sup>

But the greatest abuse connected with the franking privilege lies not in the burden upon the Post Office Department, substantial as that is. More serious is the cost for printing in the *Congressional Record* and its bulging Appendix an enormous amount of useless stuff and political advertising for the sole advantage of those who seek such publicity. There is also involved a moral cost in the Government's allowing itself to be made a party to the shabby evasion by which thousands of pages of the *Congressional Record* are filled with grotesquely inappropriate matter masquerading as 'remarks' of its legislators.

#### SOME OTHER PERQUISITES

In the First Congress the question was repeatedly under debate, what newspapers, if any, should be furnished free to Senators and Representatives. In the House, Madison favored 'taking the whole of the press or none, as taking a part would be giving a preference to particular persons and would savor of partiality.' Other members urged retrenchment, emphasizing the rapidly increasing expense, if copies of all the 'newspapers printed at the seat of Congress' should be supplied to each member. In December, 1790, it was ordered that each of the members be furnished with 'three of the public newspapers printed in this city [New York], at their own election.'<sup>2</sup>

Specific items for 'newspaper' or 'postage' allowances have long since ceased to be made, but there is an annual allowance to each member of \$125 for 'stationery.' This allowance has not been for official stationery, all of which is furnished free, but for personal stationery, books, periodicals, and, in fact, for a considerable variety of things of use to the Senators' families.<sup>3</sup> The list of articles supplied

<sup>1</sup> *Worcester Evening Gazette*, Aug. 3, 1932. Says Robert Luce: 'There is ample warrant in declaring that a Congressman ought not to be asked to pay postage on any letter or document he would not have mailed but for his official position.' *Legislative Assemblies*, 577.

<sup>2</sup> *Annals of Congress*, Dec. 9, 1790.

<sup>3</sup> Willard French, 'Senatorial Privileges and Expenses,' in *Independent* (June 15, 1911), 1296-1305, notes many points of interest.

at the request of Senators through the stationery room gave rise to so much amusement and criticism that in 1926 it was ordered that thereafter the Senate's Audit Committee should 'make regulations specifying the classes of articles which may be purchased by or through the stationery room of the Senate.' Any balance remaining undrawn upon a Senator's 'stationery' allowance at the end of the year is paid over to him in cash.

In the middle of the past century, sets of *American Archives* and other books to the value of about a thousand dollars were distributed to each member of Congress. Horace Greeley wrote of a member, well known to him, 'who was reported to have sold his order and gambled away the proceeds, before going to his lodging, the night after the appropriation was voted.'<sup>1</sup>

Expense accounts for Senators sent on inspection trips, or to conduct hearings of investigating committees throughout the country, are often suggestive of pleasant travel and recreational opportunities.

Until well into the present century there survived certain boards and commissions whose chief *raison d'être* seemed to be to provide high salaries and handsome office accommodations for Senators for whom the Government cherished a friendly feeling.<sup>2</sup>

Last perquisite of all which may be claimed for a Senator dying in service in the Capital might be cited the right to be buried in the 'Congressional Cemetery,' and to have a granite monument erected there to his memory at government expense, but the custom of erecting 'cenotaphs' for those dying elsewhere seems to have lapsed.<sup>3</sup>

#### THE 'CONGRESSIONAL RECORD'

Not least among the Senator's privileges and perquisites are those which come to him in connection with the *Congressional Record*. It

<sup>1</sup> *Recollections of a Busy Life*, 222-23.

<sup>2</sup> Willard French, *op. cit.*, instanced the National Monetary Commission, the Joint Canadian Boundary Commission, and the Fortification Board as samples of such sinecure commission places.

<sup>3</sup> In House debate of an appropriation bill in 1876, George F. Hoar moved to 'strike out the provision that all monuments hereafter to be erected [in the Congressional Cemetery to officers of the Government] "shall be in the form of the Cenotaphs heretofore provided.'" For many years that provision had gone unchallenged. He explained:

It is certainly adding new terrors to death to propose that in any contingency, whatever may be the poverty or degradation of any Member of Congress, his body should be put under a structure similar to the Cenotaphs now there, which are only excusable on the ground that nobody is buried under them. I cannot conceive of an uglier shape to be made of granite or marble than those Cenotaphs now there. To propose gravely to require by law that for all time structures of that fashion shall be placed over deceased Congressmen seems to me a little too bad.

By this amendment, adopted without a word of dissent, an end was put to the erection of these grotesquely crude and ugly cenotaphs.

gives publicity to his official activities — his committee assignments and the reports that he makes, the list of the bills and resolutions that he introduces, and the part that he takes in the Senate's daily sessions. Each branch of Congress is required by the Constitution to 'keep a Journal of its own proceedings.'<sup>1</sup> The *Journal* is the authoritative source of information as to Senate action, but it is a terse summary of results, whereas the *Congressional Record* which appears every morning during the session of Congress, is supposed to present a substantially *verbatim* report of Senate debates and a detailed account of the Senate's proceedings.

But the *Congressional Record* is not in all respects a faithful witness. Its columns by no means 'tell the truth, the whole truth, and nothing but the truth,' as to what a Senator actually said in debate. In the first place, the Senator has an opportunity to revise proof of his part in the debate, as set up for the day's *Record*; he may make minor changes of phrase, but he should not change the notes of his speech in such a way as to affect the remarks of an opponent in controversy, without bringing the correction to the attention of that member.<sup>2</sup> He may request permission to have certain portions of his remarks stricken from the *Record*, before it appears in permanent form. Dial, a Democratic Senator from South Carolina, made a speech in the Senate, harshly criticizing the trend in his own party. Several days later, realizing that his remarks had given offense to quite a number of his colleagues, he made a personal explanation, expressed regret at having caused offense, and asked permission to withdraw certain phrases. But his colleagues were not to be appeased by such a 'half-hearted apology.' Criticism of other passages and of the whole tenor of his speech continued, until he made the request — which was granted — to withdraw the entire speech from the permanent *Record*.<sup>3</sup> On not a few occasions the Senate itself has taken the initiative to withdraw certain portions of the debate as first reported in the *Record* of the day. In revising some remarks made in the Senate, Call (Florida) made material alterations and insertions which made his language still more galling. A resolution was promptly offered declaring this 'a breach of privilege for which the said Senator is hereby censured; and it is ordered that the words so inserted and the paragraph so added be stricken from the *Congressional Record*.' After report from a commit-

<sup>1</sup> Constitution, art. I, sec. 5, par. 3.

<sup>2</sup> Hinds, *House Precedents*, V, sec. 6972.

<sup>3</sup> Jan. 3 and 7, 1925, *Cong. Rec.*, 1363-64.

tee and much debate, it was ordered that in future editions of the *Record* those paragraphs be stricken out.<sup>1</sup>

By unanimous consent — the request for which in this connection is practically always granted without objection — the Senator may have printed in the *Record*, ‘as a part of his remarks,’ material of whatever nature and in whatever amount his sense of propriety may suggest. Thus, in 1914, La Follette addressed the Senate upon railroad rates, a decision in regard to which was then pending in the Interstate Commerce Commission. He brought in ‘a mass of material,’ and said, ‘I shall ask to have the material, for the most part, printed in the *Congressional Record* without reading.’ When that day’s *Record* appeared, it contained the speech of about five pages, followed by 360 pages of the aforesaid ‘material,’ mostly printed in fine, solid type, representing to the Government an officially computed cost of \$13,760.85. In the House, Barnhart denounced this as the worst abuse of ‘leave to print’ in the *Record* he had known.<sup>2</sup> He said that it afforded an illustration of the importance of passing at once the pending printing bill, which would allow no member ‘to inflict extension-of-remarks expense upon the people of more than four *Record* pages without a resolution duly and regularly passed to that effect.’

The younger La Follette has proved himself an apt pupil of his father. In 1932, when the problems of unemployment and balancing the budget were most acute, before beginning argument upon his bill calling for the appropriation of \$125,000,000 for direct federal relief, he asked unanimous consent to have inserted in the *Record* the replies to a questionnaire which he had sent to mayors and other informed persons throughout the country. Questioned as to whether the material were not likely to prove bulky in the printing, and whether it could not be

<sup>1</sup> March 12, 1890. By vote of 36 to 14. Call made a ‘personal explanation’ which gave great offense. (*Cong. Rec.*, 5475; 6468–72.) In the 67th Congress the Senate voted that certain sections of a ranting speech by Heflin be stricken out in future editions of the *Record* (LXIV, 2831; 2862; 2871; 2928). See controversy between Brown and Ingalls as to interpolated insults. David S. Barry, *op. cit.*, 44–47.

<sup>2</sup> Barnhart declared that if each Senator and Representative had been equally prodigal of the taxpayer’s money, the publication of each one’s ‘remarks’ upon a single topic would have cost the country more than \$7,307,000. He commented: ‘That the purpose of the bulky publication is to exploit a name or an issue, many will surmise; and that the unnecessary, extravagant expense is an outrage upon the taxpayers of the country everybody will admit.’ Speaker Clark ruled against points of order raised as to this language. James R. Mann defended La Follette’s action, attributing to him a sincere belief that what might almost be called a conspiracy was being made to influence improperly the Interstate Commerce Commission in reference to the most important question which had ever been brought before that commission, and that the grounds for his belief could only be demonstrated by the publication of these documents. *Cong. Rec.*, 7728–8093; 8592–93, May, 1914.

'digested in groups, so to speak,' he replied that it might prove bulky; but he added that these answers to his questionnaire were 'perhaps, the only reliable information in existence concerning particularly the smaller cities and villages of the country.' He acknowledged that he had sought no information from governors, nor had the mayors been asked whether they had sought help from the governors of their own states and been denied relief. Without objection, his request was granted. The result was the printing in the *Record* of a 'speech' of nearly 200 pages, about 175 of which were devoted to the printing in solid, fine print of some seven or eight hundred replies to his questionnaire.<sup>1</sup> The cost of printing this mass of undigested material — of dubious significance in view of the form in which some of the questions were cast, and the omission of other and most pertinent inquiries — was estimated to exceed \$10,000.

Not only may a Senator, thus, cause his own remarks in debate to be 'extended' without limit in the *Record*, but merely for the asking he may secure unanimous consent for the printing therein of utterly irrelevant matter — it may be a speech or an article of his own upon any topic whatever.<sup>2</sup> If modesty deters him from asking this favor, a friendly colleague is ever willing to make the necessary request.<sup>3</sup> Members of both Houses are too apt to tickle the vanity of constituents by securing the insertion, in the body of the *Record*, of their speeches or writings, and to curry favor with the press and the magazine publishers by securing the insertion of their editorials or articles.

There still remains as a recourse for the publicity-seeking Senator the *Congressional Record's* Appendix as the 'catch-all,' the 'elastic rag-bag' into which every manner of tedious and irrelevant matter may be crammed for printing. Here the member's 'speechless speeches' often find a dusty embalming. If his revised proof for the daily edition of the *Record* is not returned in time for publication in the day's pro-

<sup>1</sup> Feb. 2, 1932, *Cong. Rec.*, 3087-3260.

<sup>2</sup> Thus, Heflin (April 4, 1930, *Cong. Rec.*, 6514-16), on the eve of his campaign for renomination, secured unanimous consent to have printed in the *Congressional Record* the story of his boyhood, on the ground that 'it would be helpful to American boys who are struggling with hardships such as I experienced in my boyhood.' This filled two pages of the *Record* with highly colored and wholly inappropriate details, at a cost to the Government of over \$100. Reprints could then be secured at trifling cost, and sent under frank by hundreds of thousands to Alabama constituents.

<sup>3</sup> If a frugal member of the Committee on Printing makes protest, the Senator has but to start to read the protested matter as a part of his own 'remarks' to gain a prompt though unwilling withdrawal of the objection — a course which saves time, but wastes money. The last indignity which Schall inflicted upon the Senate was his getting read into the *Record* a rankly partisan harangue, printed under the title, 'Tom Schall's Creed,' and beginning: 'Citizens of Minnesota!'

ceedings, the printer inserts in the proper place in the report of the debate: 'Mr. Blank addressed the Senate. His remarks will appear hereafter in the Appendix.' Some Senators have been said to make a practice of delaying the return of their proof with the deliberate purpose of making it impossible for their opponents to respond effectively.<sup>1</sup> The original speaker thus secures ample time to edit and polish his 'remarks,' which will presently appear in the Appendix without having been torn to pieces in Senate debate. The Appendix thus becomes an *olla podrida* of any miscellaneous fragments of printing which will in some member's belief be of public interest, or will advance his own political interest by gaining the attention or flattering the vanity of some constituent.

The senselessness and the wastefulness of printing such a conglomeration is a matter of frequent and severe criticism. The Senators might seem to have less need for such an outlet, since their rules permit them in the Senate Chamber to emit words without limit as to volume or relevance. But in fact the record of the Senate in padding the Appendix is said to show less restraint than that of the House where there are resolute objectors to the printing of matter having no relation to the business before the House. The abuse is growing. In ten years the proportion of the Appendix to the *Record* increased from six to twenty-three per cent.<sup>2</sup> The cost is scandalously out of proportion to the value of the Appendix to the public. In a recent session of Congress the cost of printing a single week's contributions to the Appendix was practically \$700 a day.<sup>3</sup>

<sup>1</sup> During the term, the limit is thirty days; after the end of the session, ten days.

<sup>2</sup> Underhill. The speaker added that the Appendix 'consisted mainly of matters that clearly do not belong in the *Record*. . . . This continual filling of the *Record* with what might be designated as political propaganda, advertising, claptrap, and bunk ought to stop.'

What the preposterous padding of the *Record* costs the Government is officially stated as follows:

The average cost of the *Congressional Record*, based on the number of pages in the permanent bound edition and the full cost of the daily, bi-weekly, index and bound editions, is from \$45 to \$50 per page depending on the amount of 6-point and tabular matter which may be ordered printed in the daily edition.

When a member of Congress places an order for copies of an extract from the daily *Record*, he pays the cost of making plates (extracts usually are printed in a smaller page than the daily *Record*), imposition, presswork, paper, and bindery work. No charge is made for composition, as the original type can be used.

(Letter from the Public Printer to the writer, Sept. 24, 1935.)

<sup>3</sup> Congressman Underhill, most persistent in protest against this waste and abuse, has pointed out that there is abundant law for its correction, and cited (28 Stat. 603): 'The Joint Committee on Printing shall have control of the style of the *Congressional Record*, and while providing that it shall be substantially a *verbatim* report of proceedings, shall take all needed action for the reduction of unnecessary bulk.' *Cong. Rec.*, 1259, Jan. 8, 1930.

Not satisfied with the publicity secured through the *Congressional Record* and its Appendix, some Senators have been urgent that the Senate Chamber be equipped with radio, so that the 'country' can listen to the debates, and reports have been made as to the probable cost and efficiency of such equipment.<sup>1</sup>

<sup>1</sup> S. Res. 197. Agreed to, May 2, 1924, *Cong. Rec.*, 7666.

## XVII

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HISTORIC SENATE CHAMBERS:  
SOME CHANGING CUSTOMS

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It is at length determined that a gallery is to be built and our debates public at the next session of Congress. What the effect of this measure, which at the last carried by a great majority, will be, I know not; but it cannot produce greater evils than the contest about it. . . . Some of the younger members may descend from their dignity so far, perhaps, as to court popularity at the expense of justice, truth and wisdom, by flattering the prejudices of the audience, but I think they will lose more esteem than they will acquire by such means.

VICE-PRESIDENT JOHN ADAMS  
Philadelphia, February 23, 1794

At the origin of the Government no arrangements in the Senate were made for spectators; in this Chamber about one third of the space is allotted to the public; and in the new apartment the galleries cover two thirds of its area. . . . Yet it should never be forgotten that not France, but the turbulent spectators within the Hall, awed and controlled the French Assembly. With this lesson and its consequence before us, the time will never come when the deliberations of the Senate shall be swayed by the blandishments or the thunders of the galleries.

VICE-PRESIDENT JOHN C. BRECKINRIDGE  
January 4, 1859

Wherever we sit we shall be the Senate of the United States of America — a great, a powerful, a conservative body in the government of this country, and a body that will maintain, as I trust and believe, under all circumstances and in all times to come, the honor, the right and the glory of this country.

SENATOR JOHN J. CRITTENDEN  
January 4, 1859

Here the sunlight never enters; here we never breathe the pure air of heaven; . . . While we remain we must live in a dungeon. This Chamber is an architectural failure — I had almost said, an architectural outrage.

SENATOR ORVILLE H. PLATT  
April 13, 1886

What benefit do we get from destroying this magnificent Chamber which is unequaled almost in the world? Might not the result be a Chamber less satisfactory to a later generation?

SENATOR CLAUDE A. SWANSON  
February 14, 1931

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# XVII

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## HISTORIC SENATE CHAMBERS: SOME CHANGING CUSTOMS

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### THE SENATE CHAMBER<sup>1</sup>

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AFTER the Congress of the Confederation had determined that the new Government should be inaugurated in New York City,<sup>2</sup> the Mayor was authorized to tender the use of the Old City Hall for its accommodation. Forthwith began the transformation of that building into the 'Federal Hall.'<sup>3</sup> When the changes were approaching completion, a local newspaper gave a description of the building, ending with the comment, 'We think the whole has an air of grandeur.' The architect apparently laid himself out upon the exterior of the building and upon the Representatives' Hall. It was a spacious apartment with four fireplaces; at the north end was the Speaker's chair,

<sup>1</sup> For suggestions which have added greatly to the accuracy and interest of the part of this chapter relating to the successive Senate Chambers the writer is deeply indebted to Mr. David Lynn, the Architect of the Capitol, who kindly consented to read the manuscript.

<sup>2</sup> Sept. 13, 1788.

<sup>3</sup> The architect was Major Pierre Charles l'Enfant, who two years later drew the original plan of the City of Washington. The cost of the transformation was estimated at \$32,000, which was advanced by some New York men of wealth. The actual cost proved to be about \$65,000, half of which was ultimately paid from taxation and the other half by lottery, authorized in 1790 by the legislature of New York. *Centennial of the Inauguration of George Washington* (Clarence W. Bowen, ed.), 14 ff.; E. V. Smith, *New York in 1789*, 42-43.

When the seat of the Government was removed to Philadelphia, the 'Federal Hall' again became the City Hall. In 1812 it was torn down. Later the old Custom House stood upon that site; this was replaced by the United States Sub-Treasury Building, still standing at the corner of Wall and Nassau Streets.

from which there projected into the center of the room a long table about which were the seats for some sixty Representatives. Opposite the Speaker's chair were two galleries, one above the other, for spectators. 'The Senate Chamber,' says this same description, 'is about forty feet square and fifteen feet in height, with convenient fireplaces,<sup>1</sup> and neatly wainscotted; the ceiling plain except a sun and thirteen stars in the center.'<sup>2</sup>

In their several chambers the House and the Senate had been assembling for some weeks before arrangements were completed for President Washington's inauguration. April 30, at the appointed hour, he was formally received by both branches of Congress, assembled in the Senate Chamber, and, attended by the Vice-President, the Senators, the Speaker and Representatives, and 'other public characters,' he proceeded to the outer gallery adjoining the Senate Chamber, where the oath was administered by the Chancellor of the City of New York, whose proclamation, 'Long live George Washington, President of the United States,' was answered 'by an immense concourse of citizens . . . by the loudest plaudit and acclamation, that love and veneration ever inspired.'<sup>3</sup>

After this ceremony, the President returned to the Senate Chamber where he delivered his inaugural address to the Senate and House of Representatives. In this modest chamber — of which no authentic picture is now available — behind closed doors the little group of a score of Senators of the First Congress conducted their first two sessions. It was here that the Senate's first rules were adopted and many an important precedent was established.

March 4, 1789, the very day on which it was intended that the Government established by the Constitution should go into operation in New York, by unanimous resolution the Assembly of Pennsylvania made a respectful offer to Congress 'of the use of any or all of the public buildings in Philadelphia belonging to the State or to the County of Philadelphia in case Congress should at any time be inclined to make use of that city for the temporary residence of the federal government.' Accordingly, for ten years, from December, 1790, to November, 1800, Congress met in the Philadelphia County Building which was thenceforth known as Congress Hall. Practically all of the first floor was assigned to the Representatives' Hall. On the

<sup>1</sup> These were of American marble, 'of as fine a grain as any from Europe,' writes the enthusiastic correspondent of the *Massachusetts Centinel*, March 18, 1789.

<sup>2</sup> *New York Daily Gazette* (March 6, 1789), 2.

<sup>3</sup> *Ibid.* (May 5), 2.

second floor was the Senate Chamber fitted up and 'furnished in a much superior style to the House.'<sup>1</sup> The President of the Senate occupied the platform at the south side of the room. Not until 1795 was there erected, at the instance of James Monroe, a suitable gallery along the northern side of the Chamber for the accommodation of the public. Four small rooms on the second floor were used as committee rooms and offices. In this Chamber occurred Washington's second inauguration.

In 1800, the seat of the Government was removed to Washington. November 17 had been set as the date for the beginning of the session, but by that date only fourteen Senators had arrived, nor was a quorum secured until November 20. Two days later, having taken formal possession of the new Capitol, Congress listened to an address by President John Adams. The Senate Chamber was in the north wing, upon the basement level, occupying the floor space of what later served (till 1935) as the Law Library of the Supreme Court; but originally this Chamber was carried from the basement floor through the first story. It was described as 'a room of dignity and refinement.'

Encircling the Senators' seats was an arcade, with paneled piers and molded capitals and faces. On this arcade rested a gallery<sup>2</sup> on the same level with the first floor of the Capitol. Over this Senate Chamber was a large room on the attic floor for clerks. Apparently at Jefferson's proposal in 1809, the Senate Chamber's floor was raised to the level of the gallery and the clerks' room was removed, so that the Chamber was carried up to the roof line. It came thus to occupy the space which served as the Supreme Court Chamber (1859 to 1935), while the space below it, on the basement floor, became the Supreme Court Chamber where many of Marshall's weighty opinions were delivered.<sup>3</sup>

August 24, 1814, British soldiers attempted the total destruction of the Capitol. The Senate and House Chambers and the corridors connecting the wings were piled high with inflammables. The roof and

<sup>1</sup> *Independence Hall*, Bulletin No. 4, 11.

<sup>2</sup> Glenn Brown, *History of the Capitol*, I, 25 ff. The dimensions of the room were 86 feet in length, 40 feet in breadth, 41 feet in height.

<sup>3</sup> This apartment later became the Library of the Supreme Court. While these alterations were being made, the Senate's sessions were held in the 'Library,' the room which had been vacated by the House of Representatives when it moved into its new quarters in the South Wing. During the Senate's special session in 1809, it met in the Hall of the Representatives.

floors were burned, and the marble columns in the Senate Chamber were so injured that they had to be replaced. While restorations were in progress, the Thirteenth Congress met in a building which had been known as Blodget's Hotel, and which, at the time of the burning of the Capitol, was being used as the Post Office.<sup>1</sup> This proved inadequate to house Congress and the Supreme Court. Fearing that Congress might leave Washington unless more adequate quarters were provided, the Capitol Hotel Company, organized by prominent citizens of the District of Columbia, erected a building for the temporary accommodation of Congress. This was occupied from 1815 to 1819 while the repairs upon the Capitol were in progress.<sup>2</sup>

The reconstructed Senate Chamber, from 1859 to 1935 occupied by the Supreme Court, was the most attractive home which the Senate has ever known. It was semicircular, covered by a dome, 'richly ornamented with deep sunken panels and circular apertures to permit light from above.' Columns or shafts of breccia with capitals of statuary marble formed a screen. Their entablature supported a narrow gallery. The Vice-President faced another lighter gallery which ran around the circle of the room.<sup>3</sup> A principal feature of the room was Rembrandt Peale's portrait of Washington, which now hangs in the Vice-President's room. The Senators' desks and chairs of mahogany were upon semicircular platforms, each row higher than the next. The Chamber's plain walls and the low-vaulted dome made its acoustic quality excellent. The last session held in this historic Chamber was one of great solemnity in which there were mingled deep regret and serious foreboding. The Senators' universal regret at the moment of leaving the scene where so much history had been made was fittingly expressed by two Kentucky statesmen, in the tender reminiscences of the venerable John J. Crittenden, who had begun his service in that Chamber more than forty years before, and in the eloquent address of

<sup>1</sup> This was located on the northwest corner of 7th and E Streets, N.W. *Documentary History of the Capitol*, 172; 'Old Senate Chamber,' 7, S. Doc. 67, 74th Cong., 1st sess.

<sup>2</sup> This building, at the corner of First and A Streets, N.E., later called the 'Brick Capitol,' during the Civil War served as a prison for Southern sympathizers. In later years it became the headquarters of the National Woman's Party, until torn down in clearing the site for the Supreme Court Building.

<sup>3</sup> This gallery, which used to be thronged with spectators in the days of the Senate's greatest distinction, was removed when this Chamber was remodeled for the use of the Supreme Court. (Glenn Brown, *History of the Capitol*, I, 61-69; plates 83 and 103.) The dimensions of this Chamber were: diameter, 75 feet; greatest width, 45 feet; height, 45 feet. For an excellent picture of this Chamber, see Charles Warren, *The Supreme Court in United States History* (1922), II, 60.

the brilliant young Vice-President, John Cabell Breckinridge, ending thus:<sup>1</sup>

These marble walls must moulder into ruin; but the principles of constitutional liberty, guarded by wisdom and virtue, unlike material elements, do not decay. Let us devoutly trust that another Senate, in another age, shall bear to a new and larger Chamber this Constitution vigorous and inviolate, and that the last generation of posterity shall witness the deliberations of the Representatives of American States, still united, prosperous and free.

At the end of this address, preceded by the Vice-President, the Secretary, and the Sergeant-at-Arms, the Senate proceeded to the new Chamber.<sup>2</sup>

January 4, 1859, the Senate first assembled in the new Chamber where its sessions have been held for more than seventy years. The most significant contrast was in size, for the area within the walls of the present Chamber is more than three times that of the Chamber in which the Senate reached the zenith of its fame if not of its power.<sup>3</sup> Its spacious galleries on all four sides seat nearly seven hundred people.

Less than three weeks after the occupancy of this Chamber, Hale introduced a resolution for inquiry into the practicability of reconstructing the interior of the North Wing of the Capitol in such manner that the Senate Chamber might extend to the walls of the building so as to have the advantage of windows and fresh air. A few days later, in advocating his resolution he called attention to the fact that, during a shower, rain beating upon the roof made impossible the hearing of

<sup>1</sup> For these addresses, see *Cong. Globe*, Jan. 4, 1859. They are reprinted in 'The Old Senate Chamber,' 74th Cong., 1st sess., Sen. Doc. 67.

Of the two speakers, Crittenden was perhaps the foremost Unionist in the Southern States, and his influence was of great weight in keeping Kentucky in the Union. In the new Congress he was a member of the House, and an earnest advocate of the compromise measures which bear his name. Two months after making this speech, Vice-President Breckinridge took the oath as a member of the Senate, but — in contrast with Crittenden — he 'went with the South,' and Dec. 4, 1861, he was expelled by the Senate in a resolution denouncing him as a 'traitor.' (p. 193).

<sup>2</sup> In 1934, when seventy-five years of the Supreme Court's occupancy had added greatly to the historic significance of this most notable room in the Capitol, the Senate passed the following resolution:

That the Court Room now occupied by the United States Supreme Court in the Capitol, when vacated by the Court, and the space below it formerly a part of the Court Room, shall be preserved and kept open to the public under such rules as may be prescribed by the Architect of the Capitol with the approval of the Committee on Rules of the Senate. (May 28, 1934.)

<sup>3</sup> Dimensions: length, 113 feet, 6 inches; width, 80 feet, 3 inches; height, 36 feet.

debates. He continued, 'I think it the most unhealthy, uncomfortable, ill-contrived place I was ever in in my life; and my health is suffering daily from the atmosphere.'<sup>1</sup>

The wall surfaces are treated with pilasters, and ornaments in gilded relief enrich the panels. Heavy beams carry the ceiling, which consists of glass panels containing dull mid-Victorian symbolic decorations representing 'War,' 'Peace,' 'Union,' and 'Progress.' The portrait of Washington, which used to be the most notable feature of the old Senate Chamber, has been removed to the Vice-President's room. In 1898, a resolution was passed that from time to time busts of the various Vice-Presidents who have presided over the Senate be placed in the Senate Wing of the Capitol. Accordingly, from niches in the four walls marble busts of these ancient worthies look coldly down upon what is one of the most unimpressive national legislative chambers on the face of the earth. The enormous expanse of flat ceiling must weigh heavily upon the Senators' spirits.

The Vice-President's desk is upon a platform on the north side of the Chamber. At his right is the seat of the Sergeant-at-Arms and at the left that of the Secretary. Before the desk is the table for the clerical staff, and below this are tables for the official stenographers.

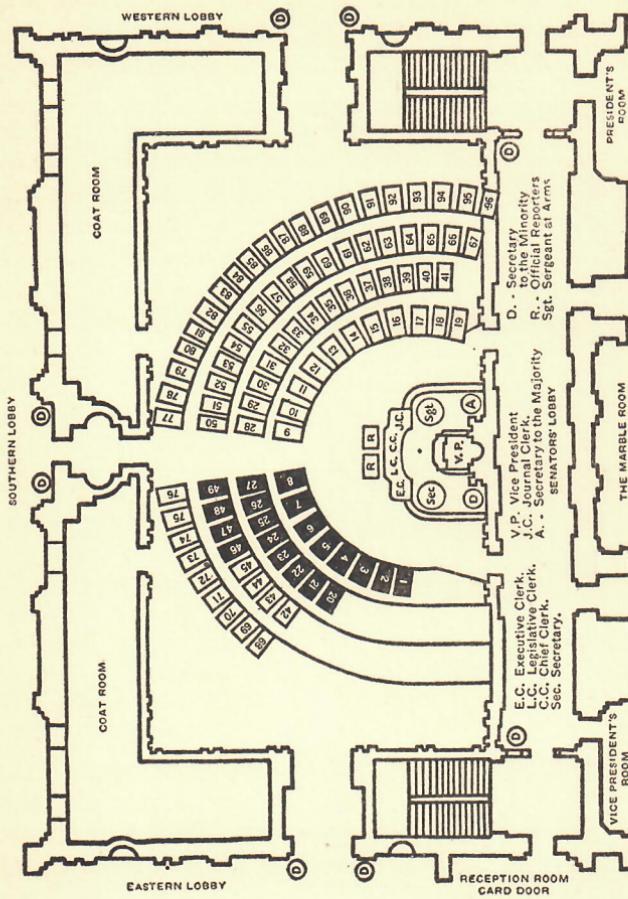
In semicircles, facing the presiding officer, are the individual chairs and desks of the Senators, grouped by parties, the Republicans at his left and the Democrats at his right. In 1921, so great was the Republican majority that several new Republican members had to be seated in the so-called 'Cherokee Strip' among the Democrats, at the extreme right of the Chair.<sup>2</sup>

It is said that from the days of Clay and Webster mahogany desks of the same pattern have been used and that some of the desks and chairs still to be seen in the Chamber have served the Senate for not less than eighty years.<sup>3</sup> When a seat becomes vacant by the death or

<sup>1</sup> *Cong. Globe*, 507, Jan. 21, 1859. Dissatisfaction with the Senate Chamber continued unabated. In 1886, O. H. Platt declared: 'Here the sunlight never enters; here we may never breathe the pure air of Heaven; here we languish and sicken and eventually die; here every vital physical and mental energy is impaired if not paralyzed. While we remain we must live in a dungeon. This Chamber is an architectural failure — I had almost said, an architectural outrage.' April 13, 1886, *Cong. Rec.*, p. 3428.

<sup>2</sup> The Republicans then held 59 seats; the Democrats, 37. In 1938 the ratio was heavily reversed as seen by the illustration on the opposite page, taken from the *Congressional Directory* of January, 1938.

<sup>3</sup> Apocryphal tales are told to gullible tourists about some of these chairs. For comments on some special chairs see D. S. Barry, *Forty Years in Washington*, 164-65.



### THE FLOOR PLAN OF THE SENATE WING OF THE CAPITOL

Seating Plan of Senate Chamber, January, 1938:

White: 76 Democrats Black: 16 Republicans

2 Farmer-Labor, Shipstead (46) Lundeen (49)

1 Independent, Norris (27) 1 Progressive, La Follette (26)



retirement of a Senator, it is offered to the senior Senator on that side of the Chamber, who takes it, if he prefers it to his own; if not, it is offered successively to Senators down the list of his party. Seniority in service thus gives the most advantageous seats to men irrespective of party leadership.<sup>1</sup> For years Robert M. La Follette, chief thorn in the side of the Republican Administration, occupied the seat next the center aisle in the front row on the Republican side, and there, immediately under the eye of the Republican Vice-President, was in frequent conference with his followers among 'insurgents' and Democrats, for the discomfiture of the Republican Party. On the other hand, when Gillett entered the Senate, the prestige of thirty-two years in the House, including three terms in the Speaker's Chair, did not suffice to relax the Senate tradition which assigned him to a seat with the 'Freshmen' in the back row on the Republican side.

The acoustic properties of the Chamber are not good. It has been said that 'speaking in the House is like trying to address the people in the Broadway omnibuses from the curbstone in front of the Astor House.' In the Senate Chamber the situation is not so bad, but its size and huge galleries make an enormous void for a voice to fill. In the House the removal of the desks and the change from individual chairs to semicircular benches has improved the conditions for effective debate. Proposals for installing amplifiers have repeatedly been under consideration by the Senate.<sup>2</sup> Heflin's insistence that the Senate Chamber be equipped with devices for broadcasting Senate debates called forth the suggestion that the committee which should report favorably upon installing broadcasting devices should at the same time report a new rule 'which will divide up the opportunities for speaking in this body,' and another Senator expressed the hope that that committee's report would contain no provision favoring the installing of radio devices 'which will enable us to hear what the country says about us'!<sup>3</sup>

<sup>1</sup> In former years Senators are said to have filed with the Assistant Doorkeeper their applications for the seat which they desired. When it became vacant, it was assigned to the one who had filed earliest, unless claimed by a Senator who was his senior. Special consideration in seating has been shown to some members who entered the Senate at an advanced age, or who suffered serious disabilities.

<sup>2</sup> S. Res. 197, May 2, 1924, and *Cong. Rec.*, 7667.

<sup>3</sup> Debate March 27 and 28, 1924. A year later, Prime Minister Baldwin announced that the broadcasting of the proceedings of the British Parliament was under serious consideration.

In 1927, report was made to the Senate that to have its proceedings broadcast by radio to the whole country would require an initial expenditure of \$3,300,000, and that

From time to time, many proposals have been put forward for rectifying obvious defects of the Senate Chamber and the Hall of Representatives as 'halls of legislation.'<sup>1</sup> To consider only the more recent proposals relating to the Senate Chamber: In May, 1924, there was introduced a resolution directing the Architect of the Capitol to consult with architects of reputation and repute with a view to improving the living conditions of the Senate Chamber, and including a plan to place the Chamber in direct contact with the outer wall or walls of the building. The Senate's Audit Committee reported favorably upon this resolution, but when unanimous consent for its immediate consideration was sought, it was blocked by Overman's objection: 'I know perfectly well that we ought to have better air in this Chamber, but if what is proposed in the resolution shall be done, as I understand it, this beautiful Chamber will be torn to pieces. I am not going to consent that anything shall be done, until I understand what is proposed.' Copeland replied: 'I wish to say that the chief object of the resolution is to preserve the life of the Senator from North Carolina.' Said Overman: 'I don't desire that my life shall be prolonged at the expense of \$10,000 of the taxpayers' money. Such an expenditure will not help me any.'<sup>2</sup> A few days later, the resolution was approved, after Borah's ambiguous inquiry, 'As I understand it, the resolution is to bring the Senate in touch with the outside world?' had been answered by Copeland, 'That is included as a possibility.'<sup>3</sup>

In compliance with this resolution, at the opening of the next session the Architect of the Capitol, Mr. David Lynn, transmitted a report on the improvement of the Senate Chamber and drawings illustrating the proposed modification.<sup>4</sup> In a letter from the consulting architects, attention was called to the fact that in 1857 — two years before the present Senate Chamber was occupied — its architect in a report to the Senate suggested that the Senate Chamber be relocated in direct communication with the exterior of the building, as the result of a

upkeep and maintenance would cost annually about \$1,000,000. Amplifiers were first used in the Senate Chamber during the Louderback impeachment trial, May 15–24, 1933, and again in the Ritter impeachment trial, in 1936. Occasional use of them is made in both chambers for purposes of broadcasting, especially in the opening and closing of a session of Congress.

<sup>1</sup> See *History of Proposals to Reconstruct the Hall of the House of Representatives*, in House Report 4021, 51st Cong., 2d sess., 363–75.

<sup>2</sup> *Cong. Rec.*, 10272, June 3, 1924.

<sup>3</sup> S. Res. 231, *ibid.*, June 7, 1924.

<sup>4</sup> 68th Cong., 2d sess., S. Doc., 161.

study to improve the acoustics of the Chamber and to render its atmosphere more healthful. In 1924, the eminent architects reported:

From every consideration of practicability, architectural treatment, and acoustics, from the standpoint of both speakers and hearers, we believe the half-circle or amphitheater form with coved ceiling offers the happiest and most satisfactory solution of the problem.<sup>1</sup>

Their recommendations called for the cutting of three very wide windows, passing through two stories, in the north wall of the Capitol, behind the line of the colonnade. In the Chamber the Senators' seats would be ranged in concentric semicircles, facing that north wall. A wide passage for general circulation was provided, back of the semi-circular wall of the Senate Chamber, with a window at either end in the north wall.<sup>2</sup>

This communication was referred to the Committee on Rules — which has jurisdiction over the Senate Wing of the Capitol — and ordered to be printed, but no further action was then taken upon it. Growing dissatisfaction with the ineffectiveness of the antiquated ventilating system in both legislative Chambers, which it was believed was largely responsible for the members' discomfort, low vitality, and high mortality rate, led Congress to appropriate something over \$300,000 for the installation of up-to-date and scientific systems of ventilation and air-conditioning in both Chambers, in 1918 and 1919.<sup>3</sup>

In 1928, an appropriation was authorized, to provide for the relocation of the Senate Chamber with direct access to an outside wall and other alterations, the cost being limited to \$500,000. It was anticipated that contracts would be let in the fall of that year, and that actual work would be begun immediately after March 4, 1929, and rushed to completion before the convening of Congress in December. Plans were prepared by the same architects who had been engaged upon the project in 1924, but when they were submitted, they were 'so unsatisfactory that no member of the committee was willing to proceed with the change according to those plans. The architects came

<sup>1</sup> Carrere and Hastings, consulting architects.

<sup>2</sup> It was estimated that these changes in the Senate Chamber, not including provision for the needed ventilating, heating, and air-conditioning equipment, would require the appropriation of \$450,000.

<sup>3</sup> The 'Necrology Record of Congress, 1893-1928,' showed that in that period 202 Representatives and 83 Senators had died in office. Although Senate membership constituted but 18 per cent of Congress, its ratio of deaths was 30 per cent. Of course, the average age of Senators was slightly higher than that of Representatives; but the death of 10 Senators in a single Congress, 1917-19, contrasted strongly with that of only 15 out of 435 Representatives.

back with a new set, and still no one was satisfied with the plans.<sup>1</sup> Hence no beginning of such alterations could be made. In 1929 and in 1930, the Legislative Appropriation Bill was amended to provide that 'the unexpended balance of the appropriation of \$500,000 for the reconstruction of the Senate Wing of the Capitol, contained in the Legislative Appropriation Act of 1929, is hereby continued and made available until expended.' But when a similar amendment came up for consideration, February 14, 1931, Reed (Penn.), a member of the Rules Committee, opposed it.

The Chamber in which we are meeting is acquiring a tradition. It is amply adequate for the work of the Senate. We are all accustomed to it, and the country is accustomed to it. There is plenty of room here. The acoustics is good. The ventilation has been much improved. We get better air all the time, and cool air in the summer time.

In the then prevailing financial depression, he believed the proposed expenditure unjustified, especially as no plans had been produced which had won general approval of the committee. Swanson asked, 'What benefit do we get from destroying this magnificent Chamber which is unequaled almost in the world?' and queried whether the result might not be 'a Chamber less satisfactory to a later generation.' Bingham advocated the change on aesthetic grounds, and Copeland stressed the fire risk of the present construction and — speaking as a health officer — the importance of getting 'sky-shine into the Chamber.' But the majority remained unconvinced: the continuing amendment was rejected, and thus the appropriation lapsed.<sup>2</sup>

#### OTHER SENATE WORK ROOMS

History-making is not confined to the Senate Chamber. On either side of the rostrum, doors open into a very spacious corridor extending the entire length of the Chamber. At the west end is the Room of the President, to which the Chief Executive comes, especially in the closing hours of a session, to attend to executive business. It has witnessed many a dramatic scene. Its murals are perhaps the most notable in the Capitol. At the opposite end of the corridor is the Room of the Vice-President, where that official is often 'at home'

<sup>1</sup> Statement of Reed (Penn.), Feb. 14, 1931, *Cong. Rec.*, 4921.

<sup>2</sup> Debate of Feb. 14, 1931, *Cong. Rec.*, 4921-26. One ground of objection to the proposal to move the Chamber to the northward is that the change would destroy the President's Room, the Vice-President's Room, and the Marble Room.



THE PRESIDENT'S ROOM IN THE SENATE WING OF THE CAPITOL



when not presiding over the Senate. Some Vice-Presidents have made it the scene of important party 'councils of war.' Between these two rooms is the Marble Room, a splendid apartment handsomely furnished as a writing and lounging room for the Senators. By windows reaching from floor to ceiling it opens upon a broad granite balcony along the north end of the Capitol. On either side of the main entrance to the Senate Chamber are the Coat Rooms, to which no person is supposed to be admitted who is not entitled to the privilege of the Senate floor.

Not without a large basis of sense was the formula in which Senator Hale used to cast his motion: 'Mr. President, in order to expedite the business of the Senate, I now move that the Senate adjourn'; for a large part of the Senate's real work is accomplished 'off stage.' It is invidious to say that the Coat Rooms of the House and Senate have become the trading posts of politics. Concessions and compromises are there made, but the ease with which such adjustments may there be reached is mainly due to the fact that there members meet man to man, no longer under the necessity of posing as spokesmen for different parties or interests.

When the Senate is in session, at the east entrance to the Chamber is the lobby, where constituents or others wishing to consult a Senator may send in their cards. If the Senator can leave the floor, the messenger brings his response, and the caller is admitted to the large Senate Reception Room to await his coming. It is an interesting place to observe the tact or tactics with which Senators greet their visitors.

Ample facilities for reading and study are provided in the Capitol, but there is a striking difference between the accommodations for Representatives and for Senators. The Representatives' Library is a small room opening off the floor of the Hall. The Senate Library, on the other hand, is a large and handsome room, on the gallery floor, quite off the ordinary tourist's beat, for it is reached through the Senate Document Room or by a narrow winding staircase. This remoteness and isolation give Senators excellent opportunities for undisturbed study or for intimate conference.

Of course, each committee room has its own library of material most pertinent to its special work. In the Library of Congress the Senate Reading Room is not equipped primarily as a place for Senators' study. It is the headquarters of the Legislative Reference Service, which, through a vast number of bulletins and reports and special studies, makes the Library's facilities available to legislators

in Congress, in state legislatures, and to other persons engaged in research. In the much larger House Reading Room is a varied collection of current material likely to be serviceable to members of Congress, and a staff of assistants is constantly in readiness to respond to the most diverse requests made in person or by telephone from the Capitol, and the subway between the Library and the Capitol is kept busy supplying the needed material.

#### THE SENATOR'S WORKSHOP

The Senator's individual workshop is his office. Until well into the present century, no Senator, unless he chanced to be chairman of a committee, had even deskroom of his own in the Capitol outside of the Senate Chamber, where he could dictate correspondence, confer with his constituents and others, or give quiet study to the problems which the Senate must consider. This fact accounts for the perpetuation of many a standing committee for years after it had outlived its usefulness.<sup>1</sup> But in 1909, there became available the Senate Office Building, a marble palace costing millions of dollars, with 'miles' of corridors. Here each Senator has at least two large and luxurious rooms, furnished with office accessories of the very best. Chairmen of committees, especially of the major committees, have larger suites, some of them very extensive. Most of the committee rooms are in the Capitol, and thirty or more Senators have offices in the Capitol, but nearly all of them have offices also in the Senate Office Building. Between the two buildings is a tunnel through which a tiny electric car maintains constant communication.

The assignment of rooms and the general administration of the Senate Office Building are in the hands of the Committee on Rules, which applies the seniority principle in allotting rooms of varying desirability. There is little realization on the part of the public of the enormous volume of correspondence which must be handled in the Senator's office.<sup>2</sup> The Government allowances for secretarial service and clerk hire fall far short of meeting the expenses of such an office. 'There are Senators who lay out twice the amount of their salaries in keeping their offices up to a standard of reasonable business efficiency.'

<sup>1</sup> Page 283.

<sup>2</sup> For analysis of a Senator's correspondence and the day's routine, see article by ex-Senator George Wharton Pepper, in *Forum*, Dec., 1925; 'In the Workshops of Congress,' by Chester Leasure, *The Nation's Business*, March, 1928, and 'A Senator's Day,' *ibid.* Also, *supra*, 375, 376.

### THE PRIVILEGE OF THE FLOOR

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The Standing Rule of the Senate which since the last general revision (1884) has been most frequently amended is the one of least importance, 'Rule XXXIII, Privilege of the Floor,' which states that no person shall be admitted to the floor of the Senate while in session, except a long list of officials or personages enumerated in the rule.<sup>1</sup> The right of the President of the United States to admission to the floor has never been questioned. Rule XXXVI specifically recognizes it as normal that he should 'meet the Senate in the Senate Chamber for executive business.' Nevertheless, from the days of George Washington's two uncomfortable visits to the Senate Chamber, August 22 and 24, 1789, until Woodrow Wilson's appearance in the Senate Chamber, January 22, 1917, no President seems ever to have entered the Chamber while the Senate was in regular session. As early as 1792 a proposal was considered to admit to the floor members of the House and to allow each Senator to 'introduce' two persons; but it was rejected by heavy vote. Even when debates were first made public, 1794, no outsiders were admitted to the floor, but only to the gallery. By 1820, though no formal change had been made in the rules, many persons were being admitted to the floor, but not within the bar. The attempt of a President *pro tempore* to permit no one to enter except upon his written order drew a vigorous protest from a Senator who asserted that it had always been the custom of the Senators to bring their friends on the floor and that he had derived great benefit from it because he could converse with them there. He insisted that it gave great solemnity to the Senate Chamber thus crowded to hear the debates.<sup>2</sup> In 1835, a rule was adopted according to members of the House, their clerks, and a considerable list of other officials, admission to the floor. Abuse of certain extensions of this rule is indicated by the fact that in 1853 all except a limited group were required, be-

<sup>1</sup> By rule of the Senate the anteroom, known as the Marble Room, is 'a part of the floor of the Senate.'

<sup>2</sup> Mangum expressed similar views. *Register of Debates*, 67, Jan. 6, 1836.

fore being admitted upon the floor, to register their names and positions in a book kept at the main entrance of the Chamber. None but Senators were to be allowed within the bar of the Senate or to occupy the seat of a Senator. On the day following the occupation of the present Senate Chamber, in order to prevent annoyance especially to members occupying the back row of desks, the rule was amended so as to restrict still further the privilege of those admitted to the floor of the Senate.<sup>1</sup>

#### SPECIAL GROUPS OR CLASSES ADMITTED TO THE FLOOR

##### *Contestants for Seats in the Senate*

In many cases contestants for seats have by resolution been given, not only the privilege of admission to the floor until their claims are decided, but also to be heard in person at the bar of the Senate.<sup>2</sup>

##### *Petitioners*

As early as 1798, without discussion it was resolved: 'That no motion shall be deemed in order to admit any person or persons whatever within the doors of the Senate Chamber to present any petition, memorial, or address or hear any such read.'<sup>3</sup> In practice, however, such a restriction became practically obsolete. While Van Buren was President of the Senate, a memorial from a meeting of three thousand building mechanics of Philadelphia was carried to Washington by a committee of thirty. They were admitted to the Senate Chamber and ranged about Webster's chair. While he presented their memorial, he pointed to them and spoke in his most solemn vein and asked Senators to converse with them to see what respectable men they were

<sup>1</sup> The present rule (XXXIII) includes the major officials of the United States in the executive, legislative, and judicial branches; Cabinet officers, and Ambassadors and Ministers of the United States, Governors of states, members of National Legislatures from other countries, and a considerable list of specified officials. The courtesy is extended for life to ex-Senators, ex-Presidents, and ex-Vice-Presidents. Regularly appointed clerks of Senators are admitted to the floor 'in the actual discharge of their official duties.' For point of order on the counting of Senators present as an 'official duty,' see p. 401.

Some question having been raised as to whether a woman had a right to be admitted to the floor, Walsh (Mass.) made formal request that Miss Ruth Patterson, special expert on rayon from the Tariff Commission, 'be granted admission to the Chamber and that she may sit by my side, that I may avail myself of her services during the further discussion of the rayon schedule.' The presiding officer ruled that the request was in order, and that she would be admitted. Jan. 8, 1930, *Cong. Rec.*, 1226.

<sup>2</sup> E.g., the resolution extending these privileges to Frank B. Smith, Dec. 7, 1927, *Cong. Rec.*, 162. Both Smith and Vare were assigned seats on the Republican side — close to the exit!

<sup>3</sup> *Senate Journal*, 481, April 27, 1798.

and hear from their own lips their ‘fearful story.’<sup>1</sup> In 1878, when delegates to a woman’s suffrage convention were gathered in Washington and requested a hearing before the Senate, a motion that their delegation be heard before the Senate, but for ‘two hours only,’ was heavily defeated, and a few days later, to head off such requests, there was introduced a resolution, practically identical in phrasing with that of eighty years before, but in addition declaring out of order any motion to admit not only any person to present a petition, but also ‘to address the Senate, except as a party or counsel in cases of contempt or impeachment.’

### Ladies

Ever since the doors of the Senate Chamber were opened to the public, its debates have proved especially attractive to the ladies. While the Missouri Compromise measures were under discussion, the records show that ladies were permitted to be seated on the floor of the Senate, and that for several days they thronged there in such numbers that they filled ‘those charming and commodious seats which belonged to foreign ministers and strangers of distinction, and all other seats, so that at last they got literally on the floor, to the no small inconvenience and displeasure of many gentlemen.’<sup>2</sup> Mrs. Samuel Harrison Smith gives amusing accounts of the deportment of the ladies of that early period on other occasions at the Capitol.<sup>3</sup>

A decade later the charm of senatorial oratory seems even to have increased.

The Senate Chamber is the present arena and never were the amphitheaters of Rome more crowded by the highest ranks of both sexes than the Senate Chamber. Every inch of ground, even the steps were compactly filled, and yet not space enough for the ladies — the Senators

<sup>1</sup> *Cong. Debates*, 826–29, March 7, 1834.

<sup>2</sup> Mrs. S. H. Smith, *The First Forty Years of Washington Society*, 149, Feb., 1820. J. Q. Adams also notes the appearance at these debates of ladies seated on the floor of the Senate. *Memoirs*, IV, 511, Jan. 24, 1820.

<sup>3</sup> For example, at the Sunday afternoon services in the Hall of Representatives, *First Forty Years*, 13–14; at Jefferson’s inauguration, *ibid.*, 25–26. On the day of Henry Clay’s speech on the Missouri Compromise in the House, the Senate adjourned that its members might hear him. Mrs. Smith records this astonishing accompaniment to that great speech: ‘The gentlemen are grown very gallant and attentive, and as it was impossible to reach the ladies through the gallery a novel mode was invented of supplying them with oranges, etc. They tied them up in handkerchiefs to which was fixed a note indicating for whom it was designed and then fastened them to a long pole. This was taken to the floor of the House and handed up to the ladies who sat in front of the gallery. I imagine there were near one hundred ladies there, so that these presentations were frequent and quite amusing even in the midst of Mr. Clay’s speech.’ *Ibid.*, 146–47.

were obliged to relinquish their chairs of state to the fair auditors who literally sat in the Senate. One lady sat in Colonel Hayne's seat, while he stood by her side speaking. I cannot but regret that this dignified body should become such a scene of personality and popular resort; it was supposed yesterday that there were three hundred ladies besides their beaus on the floor of the Senate. The two galleries were crowded to overflowing with the people and the House of Representatives quite deserted. Our Government is becoming every day more and more democratic. The rulers of the people are truly their servants and among those rulers women are gaining more than their share.<sup>1</sup>

In 1835, Calhoun's presentation of the report on the President's use of the patronage caused great excitement.

There was great agitation — some personal violence, it is said, in the Senate, even a duel apprehended. The Senate Chamber was crowded to crushing with ladies. I never go on such squeezing occasions.<sup>2</sup>

At this period Harriet Martineau got a very unfavorable impression of the ladies' importunities at the door of the Senate Chamber.

I wish every day that the ladies would conduct themselves in a more dignified manner than they did in the Senate. They came in with waving plumes, and glittering in all colors of the rainbow causing no little bustle in the place, no little annoyance to the gentlemen spectators, and rarely sat still for any length of time. . . . I wished that they could understand the gravity of such an Assembly, and show so much respect to it as to repay the privilege of admission by striving to excite as little attention as possible, and by having the patience to sit still when they happened not to be amused, until some interruption gave them an opportunity to depart quietly.

When I was at Washington, albums were the fashion and the plague of the day. . . . I have actually seen them [the ladies] stand at the door of the Senate Chamber, and send the doorkeeper with an album, and a request in it, to Mr. Webster and other eminent members. I have seen them do worse; stand at the door of the Supreme Court, and send in their albums to Chief Justice Marshall while he was on the bench hearing pleadings. . . . Nothing was done to repress these atrocious impertinences of the ladies. I always declined writing more than name and date; but senators, judges, and statesmen submitted to write gallant nonsense at the request of any woman who would stoop to desire it.<sup>3</sup>

On various special occasions by unanimous consent Senators were allowed to 'introduce ladies on the floor of the Senate without the

<sup>1</sup> Mrs. S. H. Smith, *First Forty Years*, 310–11.

<sup>2</sup> *Ibid.*, 369. In 1836, the motion of the gallant bachelor, James Buchanan, 'That each Senator may introduce not exceeding two ladies daily in the circular Lobby,' was rejected, Feb. 16.

<sup>3</sup> Harriet Martineau, *Retrospect of Western Travel*, I, 302; 255.

bar,' but not infrequently such consent was refused. In 1850, while the Compromise measures were under debate by Webster, Clay, and Calhoun, on seven days, each time on the motion of Foote, such suspension of the rule was voted.<sup>1</sup>

The present rules of the Senate designate the section of the gallery 'set apart for the use of ladies and ladies accompanied by gentlemen.' But only by suspension of the rules are ladies admitted to the floor. Of course exclusion does not extend to those women who, by virtue of membership in the House of Representatives or in some 'National Legislatures of foreign countries,' are entitled to the privilege of the floor.<sup>2</sup>

#### Distinguished Visitors

Hardly had the sessions of the Senate been opened to the public than proposals were made to introduce distinguished visitors upon the floor of the Senate. Thus, in 1805, chiefs and warriors of twelve tribes of Indians were introduced into the Senate. A few days later the absurd Tunisian 'Ambassador' was similarly honored, though John Quincy Adams made vigorous protest against such an embarrassing precedent, 'since ambassadors from the greatest nations had never received this mark of notice.'<sup>3</sup> In both of these instances the Senate adjourned temporarily before the visitors were introduced. December 9, 1824, General Lafayette was conducted into the Senate Chamber and formally introduced to the Senate; whereupon the Senators rose and remained standing till the visitor was seated, and then adjourned in order that they might have an opportunity to present their respects to him individually.<sup>4</sup> Almost the same order of procedure was followed when Kossuth was welcomed 'to the Senate of the United States.'<sup>5</sup> A resolution to admit the Reverend Theobald Matthew, apostle of total abstinence, within the bar of the Senate

<sup>1</sup> See Furber, *Senate Privileges*, 30 ff. Similar courtesies were extended to ladies eager to hear Sumner discuss the questions relating to San Domingo, March 27, 1871. See Robert Luce's amusing account of the strenuous efforts of English women to get upon the floor of the Houses of Parliament; of ladies' importunities for such privileges in the early days at Washington; and of the provision for their admission to the floor in the legislatures of two or three of the states. He concludes with the comment: 'Doubtless in various other assemblies they are admitted by custom. It is not a wise practice from any point of view.' *Legislative Assemblies*, 656-58.

<sup>2</sup> In January, 1924, something of a sensation was occasioned by the unannounced entrance to the floor outside the bar of a woman who was a stranger, accompanied by two Senators. It proved to be Frau Schreiber, entitled to the privilege of the floor as a member of the German Reichstag.

<sup>3</sup> Plumer, *Memorandum*, 361, 364.

<sup>4</sup> *Ibid.*, Dec. 29, 1852.

<sup>4</sup> *Senate Journal*, 29.

during his sojourn in Washington was opposed by several Senators as establishing a bad precedent, but Clay eloquently championed the resolution as 'a merited tribute to a man who has achieved one of the greatest [revolutions] which has been achieved by the benefactors of mankind. Sir, it is a compliment due from the Senate, small as it may be.'<sup>1</sup>

The list of guests to whom such courtesies have been extended is long and varied.<sup>2</sup>

#### *Reporters*

The official reporters of the Senate's proceedings have been shifted from the floor of the Senate to one gallery or another and back to the floor of the Senate. After the removal to the present Chamber in January, 1859, these official reporters seem at first to have been assigned to the front seats of the press gallery, but they were soon brought back to the floor, where they have since continued to sit at tables in the area in front of the Vice-President's chair. One of these reporters frequently leaves his desk and takes a vacant seat near the speaking Senator in order that he may take down his words more accurately.

From 1797 down, newspaper publishers pressed for accommodations for their reporters within the Chamber. This request was denied in 1797 when the privilege was sought in order to report the first impeachment trial.<sup>3</sup> Four years later, however, permission was granted to stenographers to take notes 'at such place within the area of the Senate Chamber as the President shall allot.'<sup>4</sup>

<sup>1</sup> Dec. 19, 1849, *Cong. Globe*, 51-59.

<sup>2</sup> May 1, 1919, former Premier Viviani and Marshal Joffre were received on the floor of the Senate, the former as of right because of membership in a foreign legislature, the latter, by suspension of the Senate rule. A more notable scene was witnessed in the Senate Chamber, Oct. 7, 1929, when Premier J. Ramsay MacDonald, fresh from concluding an agreement with President Hoover concerning the calling of a London Conference on the Limitation of Armament, addressed the Senate from the dais beside the Vice-President in such frank terms as: 'Parity? Take it, without reserve, heaped up and flowing over!'

One individual was singled out for exceptional honor, Jan. 16, 1879, when the Senate adopted the resolution: 'That the Honorable George Bancroft be admitted to the privileges of the floor of the Senate.' For twelve years until his death he was the one individual who was thus continuously privileged, as 'the ex-Cabinet Minister whose appointment was earliest in date of those now living.'

Jan. 27, 1933, the majority leader brought the British Ambassador, his luncheon guest, on to the Senate floor. A ranting Senator denounced this as a violation of the rules, and Robinson acknowledged that it had been a mistake on his part, an unintentional disregard of the rules. *Cong. Rec.*, 2657.

<sup>3</sup> *Senate Journal*, 388, July 7, 1797.

<sup>4</sup> Furber, *Senate Privileges*.

In 1835, since their occupancy of the east gallery interfered with the lighting of the Chamber, the reporters were given places upon the floor. In the new Senate Chamber the section of the gallery back of the President's desk was reserved for the use of reporters. By the rules occupation of this gallery has been strictly confined to *bona-fide* reporters for daily newspapers, not more than one seat being assigned each newspaper.

In addressing the Senate upon the occasion of its first occupying the Senate Chamber, Vice-President Breckinridge emphasized it as a virtue of the new arrangement that, whereas during the first five years of the Senate's history there was no place for the public, they were now allotted two-thirds of the area of the Chamber. The seating capacity of the present galleries is about seven hundred.<sup>1</sup>

To that gallery — and to the country-wide 'gallery' brought within touch of the Senate Chamber by the Associated Press — many a Senator lifts up his eyes and voice. Disorder in the gallery has called for rebuke and punishment. Plumer told of an afternoon when the Senate gallery was 'crowded with the sovereign mob,' and Senator James Jackson became so incensed by their demonstrations that in the midst of a speech he turned upon them and shouted: 'Citizens of Columbia, if ever you are again guilty of the like, you shall be punished and I will inflict it. The Navy shall be brought up and kill you outright.'<sup>2</sup> At the time of the expunging of the resolution condemning President Jackson, the order was given for clearing the gallery, but at Benton's suggestion only the ringleader of the disturbers was brought to the bar of the Senate under arrest and then immediately discharged. During the heated debates of the Civil War and Reconstruction periods, the gallery was repeatedly cleared, and February 23, 1866, the Sergeant-at-Arms was instructed 'to arrest without further order, any person who by applause or dissent in the gallery shall disturb the order of the Senate, and hold him subject to the order of the Senate.'

The present rule of the Senate forbids demonstration of approval or disapproval by the occupants of the gallery, and authorizes the

<sup>1</sup> For the assignment of gallery space to different groups of spectators, see Rule IV, Rules for the Regulation of the Senate Wing.

<sup>2</sup> That day several of the Senators, who had voted in favor of a bill for moving the Capitol, felt themselves outraged by the people's raiding the Capitol bearing large caricatures of them. 'Senator Wright, fearing insult from the rabble, came into the Senate with a pair of large horse pistols loaded, determined to defend himself, and if a fair opportunity presented to take vengeance on his libellers.' Plumer, *Memorandum*, March 26, 1804.

Vice-President to order that the person violating this rule be ejected.<sup>1</sup> The rule, however, is not rigorously enforced. During the debate on the League of Nations, upon an outbreak of applause the Vice-President ordered the gallery cleared, but withdrew that order at the request of several Senators who declared that most of the disorder had come from the floor.

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#### SENATORIAL 'PRECEDENCE'

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In the debates of the Federal Convention there recurred again and again the forecast — sometimes as a hope, sometimes as a fear — that the Senate would prove the aristocratic and dominant element in the new Government. In the Senate of the First Congress there was great pother over 'titles,' over the forms by which Senators should be addressed, and the mode in which communications should be sent up to that august body from the House. Some Senators passionately insisted that the dignity of the office of a Senator as the 'ambassador of a sovereign state,' and the greater scope and responsibility of his service should be recognized by the provision of a more liberal compensation for Senators than for Representatives. During the decade when Philadelphia was the seat of the Government, the Senate was distinguished from the House both in the handsomeness of its meeting-place and in the formality of its members' dress and deportment.

In Washington in its early days such courtly ceremonies and manners as had been observed in Philadelphia seemed out of place. What first impressed a newcomer to the 'raw' Capital was its dust or mud, its trees, and its 'magnificent distances.' At first sight of the new scene of his diplomatic labors, a French Minister, fresh from Paris, is said to

<sup>1</sup> La Follette declared that an insane man's outbreak was the occasion for the adoption of this rule which was never intended to ban some slight expression of human feeling from the gallery. He said that such demonstrations had usually started on the floor, and intimated 'if once in a while we could inject into the slow-moving blood of a United States Senator a little human feeling, it would be a right good thing to do.' (March 1, 1919, *Cong. Rec.*, 4707.) The doorkeepers keep a watchful eye on spectators warning them against reading newspapers, taking notes, leaning or placing articles upon the rails of the gallery or eating lunches.

have cried: 'My God! What have I done to be condemned to reside in such a city!'<sup>1</sup> As a matter of equalitarian principle, Jefferson was disposed to flout conventions of precedence. The President's table was more lavishly set forth with choice viands and wines more expertly selected than in the days of his predecessors, but as to precedence Jefferson himself wrote to a friend: '*Pele-mele* is our law.' Guests chose their own places.<sup>2</sup>

Nevertheless, questions of Senators' official and social precedence began to perturb senatorial minds, even in Jefferson's day. What formalities should be observed in the intercourse between a United States Senator and a Minister from a foreign court? In January, 1807, Tracy, a Connecticut Senator, returned the new French Minister's call 'in the usual style by leaving his card.' Meeting the Minister (General Turreau) later, Tracy referred to his having returned the visit 'unfortunately at a time when the General was absent.' The Minister replied that he had received the card; but Tracy believed 'that the Minister had called upon each of the other Senators, thus discriminating against him because of pique.'<sup>3</sup> The same Minister had an amusing experience in the Senate Chamber:

Judge R. the other day went up to General Turreau in the Senate, surveyed him from head to foot, lifted up the flaps of his coat all covered with gold embroidery, asked him the use of the gold tassels on his boots, what was such and such a thing, and how much it all might cost, all which the General very good-humouredly answered.<sup>4</sup>

Questions of precedence have often caused more concern to a Senator's wife than to the Senator himself:

Once, so it is narrated, at the White House... a 'senatorial lady,' condemned to go in to dinner behind a foreign minister's wife, seized her astonished escort and, walking in front of the other woman, triumphantly asserted her claim — the claim reflected from her husband's

<sup>1</sup> Helen Nicolay, *Our Capital on the Potomac*, 70.

<sup>2</sup> William Plumer, Jan. 1, 1807 (*Memorandum*, 553), wrote: 'at twelve o'clock, I attended the President's levee. The day being pleasant there was a great concourse of people. The Vice-president, many senators and representatives, heads of departments, foreign ministers, ladies, entire strangers, gentlemen of the vicinity — & several Indian Chiefs, with their wives and children attended.'

<sup>3</sup> William Plumer, *Memorandum*, 558.

<sup>4</sup> Mrs. S. H. Smith, *First Forty Years*, Feb. 9, 1808. But of Judge R. and another 'venerable Senator' she wrote: 'Do not think now that these good men are fools — far from it, they are very sensible men, but they have lived in the back woods, that's all.' *Ibid.*, 52.

senatorship. The comment on this declaration of superiority was the subacid remark: 'It's only the Senate's way'!<sup>1</sup>

When John Quincy Adams was Secretary of State, Vice-President Tompkins conferred with him on 'etiquette visiting,' telling the Secretary that several Senators were peculiarly tenacious of their claim to a 'first visit,' insisting that 'the Senate being by their concurrence to appointments a component part of the Supreme Executive, therefore the Senators ought to be first visited by the heads of Departments.' Adams declared this attitude illogical, and wrote a private letter on the subject to the Vice-President, asking him to show it to the aggrieved Senators. Some days later, Tompkins reported that those who had seen the letter (as Adams recorded the conversation in his *Memoirs*) 'all disclaimed any pretension to claim a first visit from me . . . but had supposed that it was a claim I had set up of receiving it from them. The fact is that those Senators who have set up the pretension are ashamed of avowing it, yet too proud to renounce it.'

Already the 'senatorial ladies' in 1820 were seeking to assert their reflected privileges in this rather absurd 'feud between the Cabinet and the Senate as to precedence.' For Adams continued:

Mr. B. . . does not claim a first visit as a Senator, but as a stranger, and Mrs. B., his wife, claims it because Mrs. Crawford and Mrs. Calhoun pay first visits to the wives of all members of Congress who came to Washington. They regret exceedingly that they cannot have the pleasure of being acquainted with us, and would accept of anything for it, such as a mere card sent by a servant. I told Mr. T. that I had sent a card of invitation to Mr. B., which he had declined accepting; that as to sending mere cards of visit to him as a stranger, I could not do it without giving all other strangers the right to claim the same thing. As to the practice of Mrs. Crawford and Mrs. Calhoun, of complimenting the wives of Members of Congress and withholding the same attention from others, I knew that often gave offense, and I thought it best, if offense must be given, that it should at least be by avoiding invidious discriminations.<sup>2</sup>

<sup>1</sup> Henry Loomis Nelson, *Century Magazine*, LXV, 504.

Some Senators get a reputation for brusqueness in claiming 'precedence.' William C. Redfield, ex-Congressman and Secretary of Commerce (in *With Congress and Cabinet*, 21 and 27), comments: 'There is a great deal of "senatorial elephantiasis." . . . A Senator called one day, accompanied by an applicant. In my office was a Representative, on a similar errand. "I am Senator \_\_\_\_ of Georgia," said the gentleman to my secretary. "I wish to see Mr. Redfield." "Please wait a moment; the Secretary is engaged," was the reply. The Senator looked hard at my assistant, and remarked: "Senators are not supposed to wait a moment." He came in. The Representative did not mind: he was probably used to it.'

<sup>2</sup> *Memoirs*, IV, 511, Jan. 22, 1820.

For a century and more the question of precedence as between Senators and Cabinet members has repeatedly been brought into discussion. The Senate has acknowledged its own pre-eminence! Referring to an article by Bacon of Georgia on 'the Senate's rights of precedence,' Gallinger (New Hampshire) said:

It is, to my mind, a very important matter, and I fully concur in the views so admirably expressed by the Senator from Georgia, whose long and distinguished public service entitles his utterances to the fullest confidence.

Upon his motion, the article was reprinted in the *Congressional Record*,<sup>1</sup> and it has also been embalmed in the Senate's book of *Precedents*.<sup>2</sup>

To a reporter's question: 'What is the proper relative rank of Senators?' the gist of Bacon's reply was as follows:

All officers of the United States, excepting only the President and Vice-President, and the judges of the Supreme Court, and the Senators and Representatives, have, without exception, been created by Act of Congress; and, if deemed necessary, Congress can at any time abolish any one of these offices and create others in their stead.... These offices, while most honorable positions, are nevertheless the mere creatures of Congress, nothing more. Within recent years Congress has created some of them, and has also abolished some of them.

It is a plain proposition that the creature cannot be greater than his creator. The Senate, as the upper branch of Congress, cannot be the inferior in rank of offices which are the mere creatures of Congress.<sup>3</sup>

In practice, the problem of precedence in recent years has been solved by a sort of compromise, in the convention of the Capital. Custom decrees that Cabinet members, being responsible heads of the several departments, should outrank the more numerous group of Senators, for example, on the inauguration platform and upon some other ceremonial occasions. On the other hand, it is the practice for wives of Cabinet officers to make the first call on the wives of Senators. As a sort of social compensation, 'Cabinet ladies' precede 'Senate ladies' at dinner.

As between the presiding officers of the Senate and the House, question used to arise whether precedence should be accorded to the Vice-President or to the Speaker. Precedent has long ruled in favor of the Vice-President.

<sup>1</sup> Dec. 5, 1913, 247-48.

<sup>2</sup> Gilfry, *Senate Precedents*, II, 194.

<sup>3</sup> Dec. 5, 1913, *Cong. Rec.*, 247.

In the Federal Convention the belief was expressed that the Senate would 'in all probability be in constant session,' because of the non-legislative powers in the exercise of which the Senate was to be associated with the President. It was even suggested that official residences might be built for them in the permanent seat of the Government. Neither of these anticipations has been fulfilled. Special sessions of the Senate have numbered only forty-seven in the years from 1789 to 1937. Nearly all of them were called on the dates of inaugurations, in order that the new President's nominations might be given prompt consideration. Twenty of them adjourned in less than a week, only sixteen lasted a fortnight, and in only two instances did they exceed thirty days.

But the Senators' longer term makes them less 'birds of passage' than the Representatives. 'A Senator's political fence is warranted for six years, while a member of the House must tinker his every two years.' In fact, his tinkering must begin almost as soon as he has taken his seat. With the assurance of six years' possession, Senators can look forward to more normal living conditions. In the First Congress, temporarily meeting in New York until the 'permanent seat' should be chosen, Izard complained that 'the members of the Senate went to boarding-houses, lodged in holes and corners, associated with improper company, and conversed improperly, so as to lower their dignity and character.' But Senators who now come to the Capital look forward to six years' stay in one of the most charming residential cities in the country. It has recently been estimated that more than a third of them own houses in Washington or its suburbs.<sup>1</sup> They bring their families to homes of their own or lease attractive houses or apartments, often place their children in Washington schools, pay taxes, and enter into the community life as they would in any other beautiful American city. Some of them have had intimate relations with its government. The present Chairman of the Committee on the District of Columbia, after years of interested service on that committee, is often referred to as the 'Mayor of Washington.' Another Senator for years was a member of the District's Board of Education. Many others have been serviceable in civic organizations in the communities where they live within the District or in adjoining suburbs in Maryland or Virginia.

<sup>1</sup> In 1933, it was reported that about 100 Representatives (or 23 per cent of the House members), owned Washington homes, as compared with 37 per cent of the Senate. Not a few Senate members have been large landowners there.

## SOME OLDTIME CUSTOMS AND TRADITIONS

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### 'STATESMANSHIP AND DIET'

Under this title a most critical delver in the source material of American history has put forward this whimsical suggestion:

The vagaries in opinion and in voting of some of our statesmen could be better explained by complications of digestion than by the psychology of today, and if the records of their convivial meetings were at hand, the effect might be traced in the measures for which the good livers were responsible.<sup>1</sup>

Many an instance might be cited — for example, from John Quincy Adams's *Memoirs* — where the Senators' 'statements were so wild and so brutally expressed as to be explained only by recognizing that the member was inflamed by drink.' Yet it may be doubted whether the health and 'statesmanship' of the first two generations of Senators were more impaired by 'intemperance' than by the kindred vice of gluttony. Their portraits and statues present many a valiant trencherman, and their letters and diaries make clear to what table temptations they were constantly subjected. European visitors were appalled by the 'groaning boards' to which they were invited.

The dyspeptic Maclay found varied and abundant viands at President Washington's table, but little of good cheer, either liquid or conversational.<sup>2</sup> 'It was the most solemn dinner I ever sat at. Not a health drank; scarce a word said until the cloth was taken away.'

In Jefferson's eight years in the White House, 'his whole domestic establishment exhibited good taste and good judgment.... The excellence and superior skill of his French cook was acknowledged by all frequenters of his table, for never before had such dinners been given in the President's House, nor such a variety of the finest and most costly wines. In his entertainments, republican simplicity was united

<sup>1</sup> Worthington C. Ford, article in *Boston Herald*.

<sup>2</sup> Page 47; Maclay, *Journal*, 137, 177, 206, 319, 374.

to Epicurean delicacy.<sup>1</sup> The President showed the utmost tact in the selection and seating of his dinner guests, and in bringing each of them into the general conversation.

Mrs. Margaret Bayard Smith, who wrote thus of White House hospitalities in the opening years of the century, in a letter to a friend (February 4, 1835) gave a most faithful and amusing account of what was considered essential in the menu for a small dinner party in Washington in that year. When Harriet Martineau, the eminent English writer, arrived in Washington, 'the British Minister was the first to wait on her, introduced her into the Senate, to the President, &c., which at once made her *Ton*. She has literally been overwhelmed with company.' She was dined by the President at the White House, by the British Minister, and lavishly entertained by the wives of two members of the Cabinet. In preparation for a modest dinner which Mrs. Smith wished to give for her, the hostess sought expert advice:

The day previous to our little dinner party, I sent for Henry Orr, whom I had always employed when I had company, and who is the most experienced and fashionable waiter in the city. He is almost white, his manners gentle, serious and respectful, to an uncommon degree, and his whole appearance quite gentlemanly. 'Henry,' said I, when he came, 'I am going to have a small dinner party, but though small, I wish it to be peculiarly nice, everything of the best and most fashionable. I wish you to attend, . . . and you must tell me what dishes will be best. "Boulli," I suppose, is not out of fashion?' 'No, indeed, Ma'am! A "Boulli" at the foot of the table is indispensable, no dinner without it.' 'And at the head?' 'After the soup, Ma'am, fish, boil'd fish, and after the Fish, canvas-backs, the "Boulli" to be removed, and Pheasants.' 'Stop, stop, Henry!' cried I, 'not so many removes if you please!' 'Why, ma'am, you said your company was to be a dozen, and I am only telling you what is absolutely necessary. Yesterday at Mr. Woodbury's there was only 18 in company, and there were 30 dishes of meat.' 'But, Henry, I am not a Secretary's lady. I want a small, genteel dinner.' 'Indeed, ma'am, that is all I am telling you, for side dishes you will have a very small ham, a small Turkey, on each side of them partridges, mutton chops, or sweet-breads, a macaroni pie, an oyster pie' — 'That will do, that will do, Henry!' [So the discussion continued, 'Henry' discriminating in long lists of vegetables, 'deserts' and other dishes in great variety between the 'genteel,' the 'old-fashioned' and the 'vulgar.' At last, Mrs. Smith concluded:] 'Well, well, Henry. My desert is, I find, all

<sup>1</sup> *The First Forty Years of Washington Society*, portrayed from the family letters of Margaret Bayard Smith, edited by Gaillard Hunt. Her husband, Samuel Harrison Smith, was the founder and editor of the *National Intelligencer*. For forty years a ready writer and woman of great social charm, Mrs. Smith was one of the most notable women in Washington society — an intimate friend of Jefferson, of the Madisons, the Clays, the Calhouns, of Wirt, Crawford, and of many others of the official circle at the Capital.

right, and your dinner I suppose with the exception of one or two things. You may order me the pies, partridges and pheasants from the French cook, and Prescilla can do the rest.' 'Indeed, ma'am, you had best' — 'No more, Henry,' interrupted I, 'I am not Mrs. Woodbury.' 'Why, to be sure, ma'am, her's was a particular dinner on account of the great English lady's dining with her.' (He proceeded to say that at that dinner Mr. Clay sat beside her, and 'talked all the time just to her, neither of them eat much. She eat (of the "30 dishes of meat") nothing but a little Turkey and a mite of ham, nothing else, ma'am, and Mr. Clay hardly as much, they were so engaged in conversation. I listened whenever I was near and heard them talking about the national debt.' . . . 'Well, Henry, it is for this Lady my dinner is to be, but it is a family dinner, not a ceremonious one. She is to spend the day just in a social friendly way with me.' 'But, indeed, ma'am, if not another besides her was invited, you ought to have a grand dinner. I should like you, ma'am, to do your best. It is a great respect, ma'am, she shows you and a great kindness you show her, and I dare say, ma'am, she'll put you in one of her books, so you should do your very best.' . . . But I carried my point in only having 8 dishes of meat, tho' I could not convince Henry, it was more genteel than a grander dinner.<sup>1</sup>

When hostesses 'did their best' — as 'Henry' reported that Mrs. Woodbury had done — it is little wonder that many a Senator fell a victim to chronic dyspepsia. In 1849, Webster projected a speaking tour of the South, very likely with the object of enlisting that section's support in his candidacy for the Presidency. But 'it almost ended in a funeral.' Almost at the beginning, unstinted Southern hospitality proved his undoing, and he had to take to his bed to recover strength enough to complete his journey and return to quiet Marshfield for full recovery.<sup>2</sup> It may be that Sumner's life was shortened by too many fine dinners and too little exercise.

Not less menacing to health and efficiency were some of the gatherings where Senators were both hosts and guests. In 1790, it was the puritanic Maclay who suggested that Pennsylvania's Senators and Representatives 'scarce did justice to the State we represented that we did not meet oftener and consult on her interest. This met with an echo of applause. . . . Mr. Morris directly spoke of wine and oysters, and it was agreed that we meet every Monday evening at Simons'.'

<sup>1</sup> *The First Forty Years of Washington Society*, 359–67, letter to Mrs. Kirkpatrick, Feb. 4, 1835. At this dinner the guests sat at table from half-after four till nearly seven o'clock, when they returned to the parlor, where evening guests were awaiting them. Henry Clay had sent most sincere regrets that his health did not permit his coming; Senators King (Ga.), Frelinghuysen (N.J.), and Calhoun were present. 'Mr. Calhoun is one of Miss Martineau's greatest admirers, his Mess gave a dinner for her.'

<sup>2</sup> Worthington C. Ford, in *Boston Herald*.

Thus was instituted the 'Pennsylvania Mess.' Thereafter on the mess day members of the state delegation sat down to dinner at half-after three in the 'evening.' Apparently oysters soon ceased to be the chief part of the entertainment. Maclay's comments read:

We soon relaxed into conviviality, and, indeed, something more.... We sat too long and drank too much; but we seemed happy and parted in good humor. (May 4, 1790.)

We sat down to dinner, half-after three. Eating stopped our mouths until about four, and from that to near nine I never heard such a scene of bestial badney [badinage?] kept up in my life. Mr. Morris is certainly the greatest blackguard in that way I ever heard open a mouth. But let me shut out the remembrance of it forever. (May 17.)

I did not join the company until about 5 o'clock and stayed until after eight. But, oh, such noise and nonsense. (June 14.)

The three Secretaries [Hamilton, Jefferson, and Knox]. They retired at a decent time, one after another. Knox stayed longest, as indeed suited his aspect best, being more of a Bacchanalian figure. (June 28.)

#### 'SPIRITUOUS LIQUORS' IN THE CAPITOL

In the first half of the eighteenth century 'indulgence in strong drink was the curse of every class and every section.'<sup>1</sup> It is to be doubted whether drinking was more prevalent in Washington than in many state capitals, or in Parliament. Maclay deplored the intemperance of several colleagues in the First Congress. Plumer, a Senator from 1802 to 1807, mentions not less than three who were brought to early death by the excessive use of whiskey or of 'ardent vinous liquors.'<sup>2</sup> In making a speech before the Senate John Randolph of Roanoke would call to the assistant doorkeeper every few minutes, 'Tims, more porter!' and John Quincy Adams baldly attributed the violence and incoherence of Randolph's harangues to intoxication. Visiting Washington in 1838, Captain Marryat commented:

Spirituous liquors may not be sold in the Capitol.... The refectory has been permitted by Congress upon the express stipulation that no spirituous liquors should be sold there, but law-makers are too often law-breakers all over the world. You go there and ask for pale sherry and they hand you gin; brown sherry, and it is brandy; madeira, whiskey; and thus do these grave and reverend signors evade their own laws, beneath the very hall wherein they are passed in solemn conclave.<sup>3</sup>

As the bookcase in the room of the Committee on Territories in Douglas's day contained a fair-sized bar, so committee rooms later

<sup>1</sup> Gaillard Hunt, *Life in America One Hundred Years Ago*, 104.

<sup>2</sup> Memorandum, 248; 459.

<sup>3</sup> Diary in America, I, 166.

offered similar facilities to such an extent that 'senatorial cold tea' became a byword.<sup>1</sup>

In the Congress before the Civil War 'the vice of intemperance,' wrote Congressman John W. Julian, 'was not as now restricted to a few exceptional cases, but was fearfully prevalent.' He declared that the House 'had been afraid to have a session after dinner,' then taken between 2 and 4 P.M., on the ground that the members 'would be rather too winy and of course too talkative.'<sup>2</sup>

But for his abject apology, in 1863, Saulsbury (Delaware) would probably have been expelled for a maudlin speech in the Senate.

At the height of the press criticism upon Andrew Johnson because of his intoxication at his own inauguration as Vice-President, *The Jeffersonian* retorted to the Democratic critics that 'two of the leading Democratic Senators were continually drunk in the United States Senate, but that the papers which now so conspicuously parade Mr. Johnson's disgraceful conduct' have never a word about that. A day or two later, when electing its standing committees the easily identified Senators to whom *The Jeffersonian* had thus referred were excluded from places thereon, their names having been omitted from the list placed in nomination by the Democrats. The Senate had been much shocked and humiliated by that inauguration scene in the Senate Chamber, and on motion of Senator Henry Wilson the Sergeant-at-Arms was directed forthwith to remove all liquor from the Senate Wing of the Capitol, and to exclude it in every form in future. Wilson also instituted a short-lived Congressional Temperance Society. At its first meeting the Hall of Representatives was densely crowded, and Senators of prominence gave it their approval.<sup>3</sup> Changes in custom and in Senate rules put restraints upon the open sales of liquor, but stimulants — 'cold tea' — served in cups at times appeared even upon Senators' desks. The 'Father of the Eighteenth Amendment' and several of its most sincere and influential supporters were members of the Senate, but its ratification did not entirely banish 'rum' from the Senate Wing, nor from Senate debate. Some of the most vociferous advocates of prohibition enforcement still gave point to Tom Reed's gibe, that he had 'never known a friend of "rum" on the floor of the House, nor a foe of "rum" in the cloakroom.' The Eighteenth Amendment had been a part of the supreme law of the

<sup>1</sup> Worthington C. Ford, in *Boston Herald*.

<sup>2</sup> *Political Recollections*, 105–06.

<sup>3</sup> Elias Nason and Thomas Russell, *Life of Henry Wilson* (1876), 378; L. C. Hatch and E. C. Shoup, *History of the Vice-Presidency*, 23.

land for a score of years when Vice-President Curtis consented to the 'planting' of a federal prohibition-enforcement agent as an employee in the stationery room of the Senate Office Building. His investigation soon resulted in the arrest of the man who had been known as the 'Congressional Bootlegger,' who had been making that building his headquarters for some years, and whose customer list was found to be quite an 'extensive compilation' of members of Congress — whose names were not disclosed.

#### TOBACCO IN THE SENATE CHAMBER

To what extent shall Senators' indulgence in 'the weed' go unchecked? No ban has ever been placed upon their chewing of tobacco. Indeed, American observers as well as notable visitors from abroad have marveled at the Senate Chamber's lavish equipment of cuspidors. Charles Dickens was especially impressed by the lack of precision in aim exhibited by many Senators, after years of ceaseless practice.<sup>1</sup>

Speaker Reed is said to have put a stop to smoking in the Hall of Representatives during the formal sessions, but no rule was adopted, and later Speakers have not effectively curbed the practice. The air in the House is often blue. In the Senate the present rule is a monument to one Senator, who had undergone an illness which made tobacco smoke exceedingly obnoxious to him. So 'Ben' Tillman moved an amendment to the rules, which now provides:<sup>2</sup>

No smoking shall be permitted at any time on the floor of the Senate, or lighted cigars brought into the Chamber.

Although the words of the rule read 'at any time,' the ban has been held not to apply to executive sessions. Indeed, Elihu Root, at the time when the proposed rule was under consideration, wrote to Tillman:<sup>3</sup>

I think the informality and freedom with which business is conducted in the executive sessions has a very valuable influence in preventing friction and unnecessary delay, and I am inclined to think that that informality is a great deal aided by the fact that the members are at liberty to smoke. That seems to be a rather visible evidence that the proceedings are informal and friendly.

<sup>1</sup> *American Notes* (1893 ed.), 106.

<sup>2</sup> Rule XXXIV, sec. 1.

<sup>3</sup> It is said that Charles Curtis, as majority leader, was highly sensitive to the Senate's mood, and often in the afternoon, when Senators' nerves were 'on edge,' he would call for an executive session. The doors would be closed, the galleries cleared, and immediately the cigars would be alight. Half an hour later, the Senate would resume its legislative session in a far more complacent mood.

'Will they take away even our snuff-boxes!' exclaimed Henry Cabot Lodge, *sotto voce*, when some member was advocating a radical break from Senate custom. In the early years in the Senate and in the House there were great silver urns, always filled 'with the choicest and most fragrant "Maccaboy" and "Old Scotch," placed where the members could help themselves freely to the nose-titillating pulverized tobacco.'<sup>1</sup> Senators acquired a reputation for their grace and elegance in the art of snuff-taking. Macon was most admired, but Clay 'was not far behind him in grace and ease.' With Clay his indulgence in the Senate Chamber seems to have been not merely as a means of personal gratification, but as a political signal to his followers. Vice-President Van Buren noted, on one historic occasion: 'Mr. Clay left his seat, on one of his snuff-taking expeditions, his common resort, when anything was going on, of which he wished to wash his hands, and occupied his time in badinage.'<sup>2</sup>

The 'great silver urns' long since have disappeared. In the House snuff ceased to be supplied half a century ago. But in the Senate Chamber by the side of each door into the Senators' lobby is a tiny lacquered box, which it is still a duty of the storekeeper of the Senate to keep supplied with snuff.<sup>3</sup>

#### SENATORIAL DRESS

Members of the First Senate took their 'ambassadorial' character seriously. Many of them were persons of substantial wealth, and disposed to formality if not to ostentation both in dress and in manner of living. The Senators' exalted station was a favorite theme of their presiding officer, and 'His Rotundity' sought to add dignity to his unimpressive figure by adding a sword to his costume.<sup>4</sup>

When Congress first convened in Philadelphia, there was noted a marked contrast between the dress and demeanor of the Senate and of the House.

In a very plain chair without canopy, and with a small mahogany table before him, festooned at the sides and front with green silk, Mr.

<sup>1</sup> J. W. Moore, *The American Congress*, 253.

<sup>2</sup> *Autobiography*, 774.

<sup>3</sup> A little lacquered box is but a trifling symbol of the age of the massy silver urn! But to see Senator Overman, most stately of twentieth-century Senators, rise from his seat on the center aisle, proceed with due deliberation to that tiny box, return to his seat, and there deliver himself of a series of sonorous sneezes, was like witnessing a solemn rite — the burning of incense to a long series of senatorial 'ancestors'!

<sup>4</sup> William Maclay, *Journal*, May 21, 1789. 'He was here this day, . . . strange to tell, without a sword.'

Adams, the Vice-President, presides as President of the Senate. Among Senators is observed constantly during the debates the most delightful silence, the most beautiful order, gravity and personal dignity of manner. They all appear every morning full powdered and dressed in the richest material. The very atmosphere of the chamber seems to inspire wisdom, mildness and condescension. Should any Senator so far forget for a moment as to be the cause of a protracted whisper while another was addressing the Vice-President, three gentle raps with his silver pencil-case by Mr. Adams immediately restored everything to repose and the most respectful attention. The Senators, in their courtesy, present a most striking contrast to the independent loquacity of the Representatives below stairs, most of whom persist in wearing, while in their seats, and during the debates, their ample cocked hats, placed 'fore and aft' upon their heads.<sup>1</sup>

Plumer wrote to his son:

The members of the House sit with their hats on, but take them off when they speak. It has rather an odd appearance to see the House covered, and the Senators and Heads of Departments, who frequently go in to hear the debates, with their hats in their hands.<sup>2</sup>

In the Senate's early years in Washington, when the new Capital was 'a wilderness of trees and mud, and when in the White House Jeffersonian simplicity was exemplified by the President's appearing in slippers down at the heels to receive the British Minister who in official dress had come to pay his respects: senatorial dress and manners lost not a little of the dignity and formality which had characterized them during the decade when in Philadelphia 'the Federalist "court" was unquestionably the most aristocratic and form-loving, and probably the most brilliant our Republic has known.' In the twenties it is said that John Randolph of Roanoke used to stride into the Senate Chamber wearing a pair of silver spurs, carrying a heavy riding whip, and followed by a fox-hound, which slept beneath his desk.' But there were still 'gentlemen of the old school.'

<sup>1</sup> It is to be noted that this awe-struck account of senatorial dignity and decorum (quoted from a Philadelphia newspaper of 1791, by Joseph W. Moore, *The American Congress*, 143-44) was written while sessions of the Senate were still held behind closed doors. Maclay's account of some sessions — e.g., those of April 28, 1790, and Jan. 17, 1791 — present a very different picture.

<sup>2</sup> William Plumer, Jr., *The Life of William Plumer*, 256. Representative James K. Polk suggested the abolition of hat-wearing in the House (1833), but 'objection was made successfully that members would have no place in which to put their hats if they did not wear them, and also that the custom of wearing hats was the sign of independence of the Commons of England, and therefore a good usage to preserve in the American House. About that time cloakrooms were established, the members gradually stopped wearing hats during the session, and in 1837 the practice was forbidden.' Robert Luce, *Legislative Assemblies*, 601.

Like Mr. Mason and John Taylor of Caroline, Mr. King had his individuality of character and dress, but of a different type; they, of plain country gentlemen; and he, a high model of courtly refinement. He always appeared in the Senate in full dress: short small-clothes, silk stockings and shoes, and was habitually observant of all the courtesies of life.<sup>1</sup>

In the thirties, the Senate was described as 'the most dignified body on earth.' Each of the 'Great Triumvirate' was individual in dress and manner. Calhoun always wore plain black clothes. Webster, on the other hand, 'rather affected the old Revolutionary colors of blue and buff, usually appearing in blue coat and pantaloons and buff vest.' Clay, while speaking, 'would walk gracefully back and forth, flourishing his silk handkerchief, and now and then would stop to take a pinch of snuff.'<sup>2</sup> Benton's long double-breasted blue coat with huge rolling collar could not fail to focus attention upon the wearer. 'Statuary Hall' and the abundant engravings of the Senate Chamber have made familiar the typical senatorial garb of that period: 'the swallow-tailed coat with brass or silver buttons, low-cut waistcoat, standing collar and voluminous white neckcloths, and stovepipe trousers.' A little later the most picturesque senatorial figure was Sam Houston of Texas, who usually wore a big Mexican sombrero, a blue coat with brass buttons, a flaming red vest, and buff pantaloons.

Conger (Michigan), whose term ended in 1887, was 'the last senatorial survivor of the swallow-tailed-coat brigade'; Hamlin (Maine) as Senator and Vice-President clung to the same garb, but in the period from 1870 to 1890 most Senators were 'encased in coffin-like "Prince Alberts."'<sup>3</sup> In recent years, however, senatorial dress has become emancipated. Few Senators now care to 'don the toga.' In the Chamber they dress like business men, 'Wearing whatever garments suit their fancy, from golf-hose to the most formal afternoon dress.'<sup>4</sup>

<sup>1</sup> Thomas H. Benton, *Thirty Years' View*, I, 57. The reference is to Rufus King, member of the Federal Convention, and still a Senator from New York in the first five years of Benton's service, 1820-25.

<sup>2</sup> Joseph W. Moore, *The American Congress*, 143-45. Hammond (N.C.) 'is very nice in his dress, rather fashionable, and wears black gloves constantly in the Senate.' *Letters of John Fairfield*, 317.

<sup>3</sup> David S. Barry, *op. cit.*, 56; 120.

<sup>4</sup> Helen Nicolay, *Our Capital on the Potomac*. In the nineteen-twenties, Overman's stately figure in long-skirted coat of silver gray looked fittingly 'senatorial,' and Heflin's cream-colored vests of wide expanse caught the tourists' eyes. On hot summer days Senators came to the Chamber in informal sack coats of light weight and color. May 9, 1929, the day when the debentures plan was passed over the leadership of Watson (Ind.), he appeared in the Chamber in a black 'Prince Albert.' To a chaffing colleague who asked the meaning of such garb he replied: 'Well, I believe in being properly dressed, and when I go to a funeral, I dress for it.'

## GAMBLING

For relief from the tedium of idle hours in the small-town Washington of a century ago, men in Congress turned not only to drink but to its kindred indulgence, gambling. Henry Clay told a colleague that he 'meant this session [December, 1806, to March, 1807] should be a tour of pleasure. . . . He told me that one evening he won at cards \$1500 — that at another evening he lost \$600. He is . . . in all parties of pleasure . . . out almost every night . . . gambles much here . . . reads but little.'<sup>1</sup> When someone expressed sympathy to Mrs. Clay because of her husband's passion for cards, she is said to have rejoined, 'Oh, but, you see, he almost always wins!'<sup>2</sup> Neither city ordinances prescribing increasingly heavy fines nor an Act of Congress (1831) making the keeping of a gambling-house a penitentiary offense put any effective curb on the vice. In thirty years it was said that not a single case was brought into court, and that in the fifties and sixties not less than a hundred gambling-places flourished in the Capital,<sup>3</sup> suited to all tastes, from alley 'gambling-hells' to those on 'the Avenue,' the most notorious of which was Pendleton's 'Palace of Fortune,' known also to its frequenters as 'The Hall of the Bleeding Hearts.' By some it was called 'the vestibule of the lobby.' Its proprietor was an operator in the lobby, and a man of great influence. When Pendleton died, James Buchanan attended his funeral, and several leading Democratic Congressmen were among his pallbearers.<sup>4</sup> At a later period John Chamberlain's Club House became the favorite with men from the Hill. Here 'a poker game was conducted virtually on a continuous plan. Although known to the newspapers as a 'senatorial' game, others than Senators sat about the green tables in the days of the Camerons, Brices, Mahones, and other Senators of the sporty and wealthy class.'<sup>5</sup> In the twentieth century poker-playing is believed not to have become a lost art among Congressmen. In the Senate Chamber during a recent Congress was one whom Speaker Cannon — no mean judge — named the best poker-player in Congress.<sup>6</sup>

<sup>1</sup> William Plumer, *Memorandum*, 608, Feb. 13, 1807.

<sup>2</sup> Helen Nicolay, *Our Capital on the Potomac*, 293. Chapter on 'Mess Life.'

<sup>3</sup> William B. Bryan, *History of the National Capital*, II, 95.

<sup>4</sup> *Washington Star*, quoted in *Literary Digest*, Dec. 29, 1917; Henry Loomis Nelson in *Harper's Monthly*, Nov., 1894; B. P. Moore, *Perley's Reminiscences*, II, 43-46.

<sup>5</sup> David S. Barry, *op. cit.*, 299.

<sup>6</sup> Apparently his hand has not lost its cunning, if press-gallery appraisal of his poker winnings in a single recent session of Congress as equal to his salary is correct. 'Richards,' in *Worcester Evening Gazette*, May 18, 1933.

The sporting instinct which drew many Senators into gaming may account for their interest in horse-racing, so intense in the early years that day after day in the week of the races the Senate adjourned without doing any business.<sup>1</sup> An English traveler in 1840 visited Washington, and being anxious 'to pay a compliment to what appears to be the staple article of commerce at this place,' on the way from the station to their hotel he and his friends selected 'lottery numbers' — the form of gambling which then seemed to be most in vogue.<sup>2</sup>

#### DUELING

One of the most interesting illustrations of the gradual change in Senators' moral ideas and habits is found in their opinions and practice as to dueling. 'Affairs of honor,' in which Senators figured as principals, spanned a period of nearly seventy years. Public opinion as to the duel varied greatly in different sections of the country.

Angered by some remark of Ellsworth's, Gunn, a Georgia member of the First Senate, threatened to 'call him out,' but a Georgia Congressman, who sympathized with Ellsworth and knew that he could not conscientiously fight a duel, offered to take his place, and Gunn desisted. Later, this senatorial fire-eater challenged a Representative from his own state. The House declared this action a breach of its privilege.<sup>3</sup>

When Burr first appeared in the chair of the President of the Senate, after his duel with Hamilton, Plumer wrote:

What a humiliating circumstance that a man who for months has fled from justice — & who by the legal authorities is now accused of murder, should preside over the first branch of the National Legislature! I have avoided him — his presence is odious to me — Federalists appear to despise, neglect & abhor him. The Democrats, at least many of them, appear attentive to him — & he is very familiar with them.<sup>4</sup>

Horror at that duel, which many regarded as a deliberate assassination, led to the inclusion in the bill for regulating the Army an article

<sup>1</sup> See pages 347, 348, for comments of William Plumer and John Quincy Adams on such adjournments in 1804. Nearly forty years later, another New England Senator, John Fairfield (Maine), wrote of a Senate adjournment forced by many members having gone off to the race-course, where a purse of \$20,000 was to be run for. He denounced this action as 'despicable to the last degree — a foul stain upon the character of our American Congress.' *Letters of John Fairfield*, 226.

<sup>2</sup> Lt.-Col. A. M. Maxwell, *A Run Through the United States*, II, 181.

<sup>3</sup> *Annals of Congress*, 786–96, March 15–18, 1796. For comment on Gunn's moral standards, see Beveridge's *John Marshall*, III, 549–50.

<sup>4</sup> Plumer, *Memorandum*, 185, July 11, 1804.

'respecting giving or receiving challenges for duels,' and White could find no Senator to second his motion to strike out that article.<sup>1</sup> A few months later, at the end of a long debate over the proposal to grant to Burr — whose term as Vice-President was to expire within a few days — the franking privilege for life, Jackson (Georgia) declared:

It appears that the principal objection to this bill arises from the personal encounter that took place in July on the Jersey shore. This can form no objection in my mind. It ought not in that of any honorable gentleman.<sup>2</sup>

On the field at Bladensburg, the scene of not less than eleven duels, occurred three in which Representatives were principals, and one in which Armistead T. Mason — a distinguished Virginian who had recently been a Senator and was the prospective Governor of that state — was killed by a cousin in a duel fought with muskets at six paces. In the Senate David L. Morrill (New Hampshire) moved that the President of the United States be requested to strike from the rolls of the Army and Navy the names of all those officers who had aided or counseled, directly or indirectly, in that duel; but nothing was done further than instructing a committee to inquire into the expediency of providing by law for the punishment of all persons concerned in dueling in the District.<sup>3</sup>

Hardly a year later the Capital was stunned by the Decatur-Barron duel. John Randolph of Roanoke, then a Representative from Virginia, moved that the House adjourn, that they attend the funeral of Decatur, and that the Representatives, 'in respect to the deceased, wear crape on the left arm for the remainder of this session.' While lauding Decatur's services, Taylor declared:

It is with the most painful regret I am constrained to say that he died in violation of the laws of God and of his country. I, therefore, cannot consent, however deeply his loss is deplored by this House, in common with the Nation, to vote the distinguished and unusual honors proposed by these resolutions.

Randolph withdrew his resolutions, and moved an immediate adjournment, but this was defeated by a heavy vote.<sup>4</sup>

In April, 1826, Henry Clay challenged John Randolph on the ground that in the Senate he had charged Clay, then Secretary of

<sup>1</sup> Plumer, *Memorandum*, 307, Jan. 25, 1805.

<sup>2</sup> *Ibid.*, 254, Jan. 25, 1805. He spoke as a connoisseur, for he had fought several duels, and received a wound the effects of which he always felt.

<sup>3</sup> Feb. 8, 1819, *Annals of Congress*, 212; 218-22.

<sup>4</sup> March 22, 1820. Vote, 50 to 83.

State, with having forged a paper connected with the Panama Mission, and with having applied to him in debate the epithet, 'blackleg.' Clay deemed it necessary, in advance of actually communicating the challenge, to have assurance in advance that Randolph would waive his senatorial privilege of not being questioned outside the Senate Chamber for anything there said in debate. Randolph answered the messenger that, though the Constitution protected him, he would never shield himself under such a subterfuge as the pleading of his senatorial privilege, and that he did hold himself accountable to Mr. Clay for the utterances in question. Benton, who by the terms agreed upon was at liberty to attend the duel as a mutual friend, though Randolph considered Benton's blood-relationship to Clay as a complete bar to his appearing as a second, devoted to this encounter an entire chapter of his monumental *Thirty Years' View*. It presents an astonishingly realistic picture of the punctilio required by the 'code of honor.' Randolph chose the Virginia side of the Potomac, since he went to the encounter as a Virginia Senator. To be sure, the law of Virginia prohibited dueling within her limits; but Randolph — as he confidentially told Benton — went out resolved to receive a fire without returning it, and he 'deemed that [to be] no fighting, and consequently no breach of her statute.' If he fell, Virginia soil was to him 'the chosen ground to receive his blood.' No blood was spilled, although twice there was firing, Randolph having received some misinformation which raised his doubt whether he might not fire to disable his antagonist. 'The joy of all was extreme at this happy termination of a most critical affair.' Two days later Clay and Randolph exchanged cards, and social relations were formally and courteously restored.

Benton ended his account thus:

It was about the last high-toned duel that I have witnessed, and among the highest-toned that I have ever witnessed, and so happily conducted to a fortunate issue — a result due to the noble character of the seconds as well as the generous and heroic spirit of the principals. Certainly dueling is bad, and has been put down, but not quite so bad as its substitute — revolvers, bowie-knives, blackguarding, and street assassinations under the pretext of self-defense.<sup>1</sup>

In 1838, Congressman Cilley of New Hampshire was killed in a duel by Congressman Graves of Kentucky.<sup>2</sup> A House committee of investi-

<sup>1</sup> T. H. Benton, *Thirty Years' View*, ch. XXVI. Also, William Cabell Bruce, *John Randolph of Roanoke*, I, 512 ff.

<sup>2</sup> De A. S. Alexander, *op. cit.*, 139 ff. Captain Marryat: *A Diary of Travel in America*, I, 169–73. His narrative is inaccurate, even to the point of making Cilley the chal-

gation recommended the expulsion of Graves and the censure of two Representatives who had served as seconds, but after long debate the report was laid on the table.<sup>1</sup> The majority — the vote was 103 to 78 — thought any punishment too severe. It was contended that there had been no breach of privilege, since in 1809 a rule proposing to make it so had failed of adoption.

The Supreme Court Judges, with one exception, declined the invitation of the House to attend the funeral of the victim of this duel, and passed a resolution and ordered that it be spread upon the minutes of the Court declaring that 'the Justices of the Supreme Court cannot, consistently with the duties which they owe to the public, attend in their official character the funeral of one who has fallen in a duel.'<sup>2</sup> In the Senate while the excitement over this duel was tense, Samuel Prentiss of Vermont introduced a bill to prohibit within the District of Columbia the giving or accepting of a challenge to fight a duel. It was well discussed, the debate being closed by Clay, who declared:

No man would be happier than himself to see the whole barbarous system eradicated forever. . . . It was well known that in certain quarters of this country public opinion was averse to dueling, and no man could fly in the face of that public opinion, without having his reputation sacrificed; while there were other portions again which exacted obedience to the fatal custom. The man with a high sense of honor and nice sensibility, when the question is whether he shall fight, or have the finger of scorn pointed at him, is unable to resist, and few, very few, are found willing to resist such an alternative.<sup>3</sup>

In a record vote, Sevier (Arkansas) was the only Senator recorded against this bill.<sup>4</sup> In the House it was championed by John Quincy Adams. After much delay, caused at the end by scandalous breaking of quorum, it was passed by a vote of 110 to 18.<sup>5</sup>

lenger; but his pages are of interest in giving the formal order of the funeral procession and his comment: 'The President of the United States, the members of the Supreme Court, and of both Houses of Congress joined in paying honors to a duellist's remains much greater than we paid to Nelson, when he fell so nobly in his country's cause.'

<sup>1</sup> Henry A. Wise, one of the seconds, had fought a duel with a former member from his own district and wounded him.

<sup>2</sup> Charles Warren: *The Supreme Court in American History*, II, 323.

<sup>3</sup> March 2, 1838, *Cong. Globe*, 206.      <sup>4</sup> *Ibid.*, 292. Vote, 34 to 1.

<sup>5</sup> Feb. 13, 1839, *ibid.*, 192-93. This bill, as it passed the Senate, is printed in Marryat's *Diary*, 173-74.

It is hard to realize the tolerance with which dueling was regarded by men in high station down to the time of the Civil War. When he was a young man, Benton and his brother had 'a very violent affray with Jackson and some of his friends in which several pistol and dagger wounds were given.' In St. Louis Benton killed a young man in a duel. Jackson challenged and killed the slanderer of his wife. Clay fought a duel with a former Senator from Kentucky (Humphrey Marshall), and killed a man in another 'affair of honor.' Randolph figured in more than one duel.

Language used by Senator Wilson in announcing in the Senate the Brooks assault upon Sumner brought a challenge from Brooks, to which Wilson replied:

I characterized, on the floor of the Chamber, the assault upon my colleague as 'brutal, murderous, and cowardly.' I thought so then. I think so now. I have no qualifications whatever to make in regard to those words. I have never entertained, in the Senate or elsewhere, the idea of personal responsibility in the sense of the duellist. I have always regarded duelling as the lingering relic of a barbarous civilization, which the law of the country has branded as crime.

While, therefore, I religiously believe in the right of self-defense in the broadest sense, the law of my country and the matured convictions of my whole life alike forbid me to meet you for the purpose indicated in your letter.<sup>1</sup>

Some discussion of the slavery issue in a California political campaign during the recess of Congress led to the challenge of Senator Broderick by Judge Terry, both of that state. In the duel Terry — who had won the toss and chosen pistols, with which he was a 'dead shot' — with deliberate aim killed Broderick by a shot through the breast, after the Senator's weapon by accident had been prematurely discharged. This cold-blooded murder of an eminent Senator, a man 'respected by his associates of all parties for the purity of his life and his scrupulous honesty,' stirred the conscience of the nation. Such was his colleagues' regard for him that when his death was announced, contrary to its own precedents in the case of victims of duels the Senate adopted resolutions calling for immediate adjournment and the wearing of mourning crape in his memory.<sup>2</sup>

But this was the last duel in which men prominent in American pub-

<sup>1</sup> Henry Wilson, *The Rise and Fall of the Slave Power in America*, I, 487. This fearless reply infuriated Brooks's admirers. They met and considered reprisal. For some time Wilson's life was believed to be in danger, but no assault was committed. Two years after the Brooks assault, Wilson was challenged by Gwin of California for 'some very opprobrious epithet' that Wilson had applied to him in debate. Wilson replied that he did not accept the code of the duelist, but that he was willing to refer the difference between Gwin and himself to any three members of the Senate, and abide by their decision. Senators Seward, Crittenden, and Davis were selected. They drew up an 'Agreement,' dated June 12, 1858. Both Wilson and Gwin were blamed, and disavowal by both was required, by assent to this 'Agreement,' each acknowledging his own fault.

<sup>2</sup> For comment on this and other duels fought by Senators or Representatives; see Robert Luce, *Legislative Assemblies*, 259–61; 285. Though speaking kindly of Broderick, Foster (Conn.) protested: 'When a man dies in direct and wilful violation of the known laws of his state, his country and his God, however dear to me he may have been, I can join in no public tribute of respect to his memory.' Feb. 13, 1860, *Cong. Globe*, 748–49.

lic life have taken part.<sup>1</sup> It seems to be the fact that, although the Senate contributed its full share to the list of congressional duelists, it was the Senate rather than the House which consistently took the lead in denouncing and attempting to repress the barbarous practice.

#### SYMPATHY AND MEMORIALS

The Senate is prompt in showing sympathy for the disabilities which may come to a colleague. The ordinary precedents as to the assignment of seats in the Senate Chamber are set aside to accommodate a Senator whose hearing is impaired. The first allowance of clerk hire to a 'private' Senator was made in the case of Vance, who was threatened with the loss of sight. To a Senator who had suffered grievous injury which entailed months of hospital care and a series of critical surgical operations, the Senate voted \$7500 from the contingent fund as a contribution toward the costs of his illness.<sup>2</sup>

To outgoing colleagues and to ex-Senators the kindly feeling of their former associates is often shown by immediate consent — waiving committee consideration — given to their appointment to other positions of honor or profit in the public service. In the early days of the present century there still survived certain boards or commissions, membership upon which took the form of sinecure positions bringing to ex-Senators handsome office accommodations, salaries as large or larger than they had received as Senators, and duties that were almost negligible.

By custom and by law the Senate notes the death of a member, and makes seemly and sympathetic provision for official participation of the Senate in the obsequies.

In recent years, if a Senator dies while Congress is in session, immediate notice of his decease is presented by his colleagues, whereupon the Senate by resolution formally expresses its regret at learning of the Senator's death, provides for the appointment by the President of the Senate of a committee 'to take charge for superintending the funeral,' and communicates this action to the House of Representatives and to

<sup>1</sup> A few months after Broderick's death, a hot personal debate in the House led to the sending of a virtual challenge by Branch to Grow, but 'his dignified refusal cost him no respect worth having.' Robert Luce, *Legislative Assemblies*, 261.

<sup>2</sup> Senator Frank L. Greene of Vermont was frightfully injured by a stray bullet fired in a Washington street fight between bootleggers and law-enforcement officers. Let it be added that Senator Greene's independence and sensitiveness were so great that, as soon as he could secure the means, he made full repayment of the sum that had been given him by vote of his colleagues.

the family of the deceased.<sup>1</sup> As a further mark of respect for their colleague's memory, usually the Senate forthwith adjourns. By Senate order there are later paid from its contingent fund 'the actual and necessary expenses incurred by the committee in arranging for and attending the funeral.'<sup>2</sup>

When Congress convenes, notice is given of the death of any member during the recess, and suitable resolutions are adopted. Later, upon some day designated for that purpose — often upon a Sunday, when no ordinary business is transacted — there are presented in the Senate memorial addresses. Many of these give evidence of the broadening of appreciation which years of service together in the Senate often develop between colleagues who at first had been utterly antipathetic. A most notable instance is that of Lamar's beautiful tribute to Charles Sumner.<sup>3</sup> It was in accordance with Tillman's request that one of the addresses in the memorial service to him was delivered by Henry Cabot Lodge.<sup>4</sup>

In some instances the actual funeral service has been held in the Capitol. Charles Sumner's body lay in state in the rotunda, and the funeral service was held in the Senate Chamber, in the presence of the President and Cabinet, and a great concourse of those among whom his life's work had been done. In 1929, within a single month funeral services were held in the Senate Chamber for two Senators of long and distinguished service, Theodore E. Burton and Francis E. Warren.

By laws dating from early in the nineteenth century provision was made whereby plots are available in the so-called 'Congressional Cemetery' for the burial of Senators dying in office. The law now provides that whenever such an interment takes place in that cemetery, a monument of granite, suitably inscribed, shall be erected, its cost being defrayed from the contingent fund of the Senate.<sup>5</sup>

<sup>1</sup> The House takes similar action, so that a joint committee represents Congress in the funeral arrangements. In accordance with present law (43 Stat. 1301) compensation for a period of not less than three months is computed and paid to the widow or heirs at law of a Senator who dies after the commencement of the Congress to which he has been elected. In 1925, five Senators died. To each widow there was paid from the Senate's contingent fund \$10,000.

<sup>2</sup> The phrasing is suggestive of early funeral journeys which assumed some of the features of a costly junket at public expense.

<sup>3</sup> April 27, 1874, *Cong. Rec.*, 3410-11.

<sup>4</sup> Dec. 15, 1918, *ibid.*, 474-75.

<sup>5</sup> Sixteen Senators have been buried there, but there has been but one such interment since the end of the Civil War — that of W. N. Roach, in 1902, several years after the end of his term as Senator from North Dakota. Funeral ceremonies, mourning rites and 'cenotaphs' are discussed, p. 905. This cemetery is between E and G streets, 18th and 19th Streets, S.E. For history of the relations of Congress to the corporation which controls it, see 59th Cong., 2d sess., S. Doc. 72, 1906.

## BADGES OF MOURNING

This day there were accounts published of the death of Dr. Franklin, and the House of Representatives voted to drape their arms for a month. . . . It is, perhaps, for the good of society that patterns of perfection should be held up for men to copy after. I will, therefore, give him my vote of praise, and, if any Senator moves crape for his memory, I shall have no objection to it; yet we suffered Grayson to die without any attention to his memory, though he belonged to our body, and perhaps had some claim to a mark of sorrow.<sup>1</sup>

The next day, Maclay seconded Carroll's motion that 'the Senate should wear crape for a month for the loss of Dr. Franklin,' but, as three members spoke in opposition, and as it was known that two others 'hated Dr. Franklin,' the motion was withdrawn. The principal ground of opposition was that the precedent might prove embarrassing if crape were worn for the death of one who had never been a member of the Senate.<sup>2</sup>

Upon the announcement, January 24, 1799, that Senator Tazewell had died that morning, the Senate at once adopted a resolution naming a committee of three 'to take order for superintending the funeral,' and 'that the Senate attend the same'; that the House of Representatives be notified of the event, and that the President of the Senate notify the Executive of Virginia of the death of Henry Tazewell, late Senator of that State for the United States; and, in a formula which for many years was used on such occasions both in the Senate and in the House, it was further:

Resolved unanimously: That members of the Senate from a sincere desire of showing every mark of respect to the memory of Henry Tazewell, deceased, late a member hereof, will go into mourning for him one month, by the usual mode of wearing a crape round the left arm.

It became customary, also, to adopt such a resolution for 'draping their arms for a month,' when, soon after the convening of a new

<sup>1</sup> Maclay, *Journal*, April 22, 1790. Grayson had died March 12, 1790. It chanced that the precedent of wearing crape was introduced in the House and the custom continued there until 1884, but the draping of the deceased Representative's chair continued till the removal of the desks in 1913. De Alva S. Alexander, *op. cit.*, 152-54.

<sup>2</sup> Oct. 31, 1803. The Senate debated for many hours a resolution that crape be worn for a month in memory of 'the three illustrious patriots, Samuel Adams, Edmund Pendleton, and Stevens Thompson Mason.' In the case of Mason, who had just died in office, the honor was voted unanimously. To the other two 'illustrious patriots' — heroes of the American Revolution — by a vote of 21 to 10. J. Q. Adams, *Memoirs*.

session, notice was given that the death of a member had occurred during the recess.<sup>1</sup>

<sup>1</sup> In the early years, upon the day of the funeral of either a Senator or a Representative in Washington, both branches of Congress used to adjourn. Plumer described one such funeral thus:

To-day at 12 O'Clock a majority of Congress attended at the house where Mr. Gillespie died. Biscuit & cheese, wine and brandy, in great abundance was on the tables in each room & chamber. After taking some refreshment the corpse was put into a hearse drawn by span of white horses.

Some 20 carriages containing nearly 100 members were in the procession, and a considerable number walked. The burial was in the north part of Georgetown. The members of the North Carolina delegation, the officers of the Senate and of the House each had white Scarfs on. Each scarf contained about three yards of fine India Cotton. It was thrown over one shoulder & the two ends were tied together under the right arm with black ribband — a bow of black ribband & one round the cloth was placed upon the left shoulder. Each of these and all the members of the House wore black crape on their right arms. The Senators had no mourning on.

Mr. Balch made a very neat elegant concise address to those who attended at the Grave. He disengaged on the mortality of man, &c. . . . He said not a syllable upon the character of the deceased. There were no prayers — 'tis not usual on such occasions in this place. . . . Mr. Gillespie was in his 64th year. He has indulged very freely this winter in the use of whiskey. I am assured from good authority that during the last week of his life there was not a single day but what he was in a state of intoxication.

Three days later the Senate put on mourning for a Rhode Island colleague who had died during the recess. Plumer commented:

The Members of both houses of the National Legislature have now the habiliments of Mourning for the loss of two of their members, both of whom were intemperate. . . . These resolves are designed as a tribute of respect and esteem for the memory of the dead. They are becoming of little consequence from the indiscriminate use that is made of them.

Of the obsequies attending the burial of Senator James Jackson lasting five hours, Plumer wrote (March 20, 1806):

The day was remarkably unfavorable. The wind N.E. cold and rainy. The masons marched near a mile & then fell off. Not more than 20 carriages reached the grave. There was not I think more than 50 members of Congress. Two federalists only besides myself. Cursed be the spirit of party. Its blind baleful malignant degrading effects ceases not with the grave. This gross negligence of an honest man roused my indignation.



# XVIII

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THE PRESIDENT AND THE SENATE:  
ACCORD AND DISCORD

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I cannot be mistaken. The President wishes to tread on the necks of the Senate.... He wishes us to see with the eyes and hear with the ears of his Secretary only. The Secretary to advance the premises, the President to draw the conclusions and to bear down our deliberations with his personal authority and presence. Form only will be left to us. This will not do with Americans!

WILLIAM MACLAY (Aug 22, 1789)

A member of long standing in the Senate feels that he is the professional, the President an amateur.

WOODROW WILSON (1908)

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# XVIII

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## THE PRESIDENT AND THE SENATE: ACCORD AND DISCORD

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IT WAS clearly the intention of the framers of the Constitution that in important respects the Senate should serve as a Council to the President, and it was thought that the Senators might be in almost continuous session at the seat of Government, in close co-operation with him. Many influences, particularly the development of the party system, have produced different results from those which had been anticipated. The formal and official relations between Senators and the President — prescribed by the Constitution itself — have already been discussed.<sup>1</sup> There remain to be considered certain significant, though less formal, relations into which Senators and the President are brought.

### SENATORS AND THE CHOICE OF PRESIDENT

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A recent writer has declared that presidential timber is not grown in the Senate Chamber. That statement is not in accord with the opinion of Senate members, nor does it square with the record. A century ago Charles Francis Adams wrote of the Senate: 'That body has become a sort of nursery for presidential candidates.'<sup>2</sup> Twenty-five years later, on the floor of the Senate Chamber Andrew Johnson

<sup>1</sup> In sections concerning the making of treaties, the powers of appointment and removal, and the trial of impeachments.

<sup>2</sup> *An Appeal from the New to the Old Whigs* (1835), 48.

made angry protest: 'Legislation is impaired and public business ruined because the Senate is President-making.... Let the people attend to that!... Damn the Presidency! It is not worthy of the aspirations of a man who desires to do right!'<sup>1</sup>

Senators were not slow to acknowledge their own availability for the Presidency. In 1808, Senator Hillhouse, in 'a dissertation of nearly two hours in length,' introduced a series of proposed amendments to the Constitution, among which was one providing that the President should be annually selected by lot from the members of the Senate.<sup>2</sup> The Senators, called in alphabetical order, should each draw a ball from a box containing as many balls as there were Senators constitutionally eligible for the Presidency — all the balls but one being white. The Senator who should draw the colored ball should be President.<sup>3</sup> In his reply to Hayne, Webster declared: 'This is a Senate of equals!' But his notion of senatorial equality was hardly identical with that of Hillhouse. Speaker Thomas B. Reed, who delighted to gibe at Senate pretensions, perpetrated, half a century in advance, an account of the election of President in 1940. According to this veracious historian, the people, grown weary of the caliber of the Presidents chosen in recent years, had amended the Constitution so as to provide that the President should be chosen by the Senate out of the Senate. In 1940, the people awaited with the tensest excitement the result of this first trial of 'the choice of the wisest man by and out of the wisest body of men.' When the time came for the announcement of the vote, the presiding officer's hesitation and pallor indicated that something unexpected had happened. 'He shouted to the vast multitude the astounding result: Seventy-six Senators had each received one vote!'<sup>4</sup>

Of the thirty-one Presidents of the United States (1789 to 1933) more than one in three had seen previous service in the Senate.<sup>5</sup> It is a

<sup>1</sup> R. W. Winston, *Andrew Johnson, Plebeian and Patriot*, 92.

<sup>2</sup> J. Q. Adams, *Memoirs*, I, 530.      <sup>3</sup> *Annals of Congress*, 356-57, April, 1808.

<sup>4</sup> Seventy-six, at the time of Reed's writing, was the total membership of the Senate. 'For a moment a stillness as of death settled upon the multitude. Never till that moment had the people recognized that... the Senate of the United States was one level mass of wisdom and virtue, perfect in all its parts, and radiant from North to South with that light of intelligence which never shone on sea or shore.' Unpublished manuscript, quoted by S. W. McCall, *Thomas Brackett Reed*, 252.

<sup>5</sup> Monroe, John Quincy Adams, Jackson, Van Buren, William Henry Harrison, Tyler, Pierce, Buchanan, Johnson (Garfield), Benjamin Harrison, Harding. Benjamin Harrison is the only one in the list whose service in the Senate was not closed by resignation. Jackson resigned twice, in 1798 and again in 1825, after the Tennessee legislature had named him as their choice for the Presidency in 1829.

Johnson had served from 1857 till 1862, when he resigned to accept appointment as

singular circumstance that nine out of these eleven Presidents had resigned from the Senate, and that but two of these resignations took place after the man's election to the higher office. While it is true that since the Civil War only three Presidents have been chosen who had served in the Senate, it is the general belief that in no previous period had the Senate contained so many hopeful candidates.

Presidential booms are often launched in the Senate, and not a few of its members eagerly exploit any issue that will enhance their own 'availability,' or that will tend to shorten the stay of a too tenacious tenant of the White House. Thus, La Follette in 1927 and again in 1928 introduced a resolution asserting that the precedent, established by Washington and other Presidents, in retiring after two terms had become, 'by universal concurrence, a part of our Republican system of government' and that

Any departure from this time-honored custom would be unwise, unpatriotic and fraught with peril to our free institutions.<sup>1</sup>

This second series of resolutions was debated for several days and finally passed by a vote of more than two to one.<sup>2</sup>

The Constitution's framers, who took pains to provide specifically that 'no Senator . . . shall be appointed an Elector,' would be aghast to see how great a part Senators have come to have in the real choice of the President. The elector has become a mere dummy. But to the national conventions of their several parties Senators throng as if to the call of a senatorial caucus. Many of them come as eager candidates. Thus, at the Republican convention in 1916 seven Senators or former Senators figured in the balloting. To the Republican convention in 1920 came sixteen Senators and divers ex-Senators as delegates,

military governor of Tennessee. Elected again for the term beginning March 4, 1875, he took the oath, but died in midsummer of that year.

Garfield was elected by the Ohio legislature, Jan. 13, 1880. While Senator-elect, he attended the Republican Convention, and strove earnestly to bring about the nomination of John Sherman for President; but the Convention forced the nomination upon Garfield. Dec. 23, 1880, he resigned as Senator-elect, and Sherman returned to the Senate on the day when he had hoped to enter the White House.

<sup>1</sup> This statement in the resolution of 1928 is identical in phraseology with a resolution introduced by Representative Springer, which passed the House, Dec. 15, 1875, by a vote of 233 to 18 (*Cong. Rec.*, 228), with no debate. The heaviness of this majority, and the fact that it included nearly all of the men of most influence in the House, are believed to have had much weight in defeating the growing movement for the renomination of Grant.

<sup>2</sup> Feb. 10, 1928, by vote of 56 to 26. For: Republicans, 18; Democrats, 37; Farmer-Labor, 1; against: Republicans, 22; Democrats, 4. The press queried: 'Shall a biased majority of Democrats and Republican insurgents determine a Republican Party nomination?'

and nine of them received votes; in the same year six Democratic Senators or former Senators figured in their convention's ballots. In the Democratic convention in 1924, before the deadlock was broken on the one hundred and third ballot, votes had been cast for eleven out of the forty-three Democrats in the Senate, and the Progressives in that year named Western Senators for both President and Vice-President. In the conventions of 1928, by singular coincidence the Republican and Democratic nominations for Vice-President both went to the respective parties' official leaders in the Senate.

Since the opening of the present century, more striking than the increase in the number of Senators who seek the nomination has been the dominance which Senators have assumed in the conduct of party national conventions, several of which have been 'officered by Senators almost down to the police.'<sup>1</sup>

Probably the choice of no President was ever more completely determined by a small group of Senators than was that of Harding in 1920. Throughout the previous eight years, especially in the years since the war, the Senate had been in almost continuous struggle with an autocratic President, and the Republican Senate leaders were now resolved to consent to the nomination of no man who, if elected, in almost his every contact with the Senate would be trying to assert his mastery. At the convention in Chicago there developed an obstinate deadlock between Wood and Lowden. The weather was oppressively hot. Friday night came, with the prospect that the wilted and impatient delegates would be held over till the next week. To the hotel quarters of George Harvey — who had been the 'discoverer' of Woodrow Wilson as a presidential possibility, and later the severest critic of the Wilson Administration — came Brandegee and Lodge. The three decided that if the convention were allowed to drift, the outcome might be accidental and unfortunate. Into that midnight conference were brought six other men — Senators Smoot, McCormick, Wadsworth, Watson, and Calder. One of the group commented: 'Here's

<sup>1</sup> Senators' dominance in national conventions was the subject of a speech by Martine in the Senate, June 26, 1916 (*Cong. Rec.*, 9757). For example, in the Republican convention of 1916 their activities were as follows: Harding was temporary and permanent chairman; Lodge was chairman of the committee on resolutions, and on its subcommittee which drew up the platform were five other Senators — a two-thirds majority. Smoot was chairman of the credentials committee, and also of the committee to confer with Progressives. Borah was one of his associates; six other Senators were active to promote harmony. In the 1916 Democratic convention eleven Senators were on the committee on resolutions. Stone was its chairman, and four other Senators were on the subcommittee that drafted the platform. Two others debated before the convention, and at least seven others were active in the convention's work.

the Senate in epitome — with a non-Senator, in place of the Vice-President, in the chair.' Later came Grundy, a private citizen from Pennsylvania, whose Republican boss, Senator Penrose, from his sick-bed in Atlantic City is said to have dominated the convention by long-distance telephone. In that conclave Lodge and Brandegee took the lead. After hours of discussion they reached a decision. In the gray of dawn they broke up, and Smoot told a reporter that there would be no further conference, and that Harding would be nominated on the next ballot. To the dismay of the leading candidates this was speedily done. That Harding received a majority of some 5,500,000 in the popular vote does not blur the fact that he had been made the party's candidate in Room 409 at the Hotel Blackstone at a secret, midnight conclave of nine men, all but two of whom were Senators, who apparently chose him in the belief that, grateful for the nomination, he would be complaisant to the will of the 'Old Guard' Republican Senators. A choice of President less in harmony with the intent of the framers of the Constitution would be hard to imagine.<sup>1</sup>

The year 1920 marked the beginning of the Senate's attempts, through its own committees, to exercise supervision and restraint upon excess expenditures and improper practices in presidential pri-

<sup>1</sup> It has been stated that a month before the convention met, the Republican senatorial group had already selected Harding as a candidate, though they waited for the psychological moment before imposing his name upon the delegates. (David S. Muzzey, *The American Adventure*, II, 762.) To the writer's inquiry as to this statement, Senator Smoot replied as follows (April 23, 1932):

I was in favor of the nomination of Senator Harding for the office of President. I know there were a number of other Senators that felt the same as I. We did not, however, support him for nomination in case of a deadlock. We were for him on the first vote and continued so until he was nominated.

Harvey's biographer, with intimate knowledge at first-hand of the facts, told of the conference in Harvey's room in Hotel Blackstone. Grundy gave his version of the affair in testimony before the Senate 'Lobby Committee' (see press reports of Oct. 30, 1929). Mark Sullivan's contemporary account of this 'nomination' is substantially in accord with those mentioned above (in *New York Evening Post*; summarized in *Literary Digest*, 52-56, July 3, 1920). Ex-Senator H. S. New (*Saturday Evening Post*, May 28, 1932) wrote of the 'fabulous fictions' which grew up about the Harvey conference, insisting that Harding's nomination had already been resolved upon, and its sponsors were awaiting only the tactical opportunity to spring it upon the convention. But New was not present at the conference, and in some important respects his statements do not tally with those of men who saw and heard its proceedings. Harvey declared that Harding was nominated 'because there was nothing against him, and the delegates wanted to go home.' But a year before the convention met, Harvey had made definite prediction that Harding would be its nominee. (W. F. Johnson, *op. cit.*, 278-79.)

It is a singular coincidence that at that Chicago convention another group of Senators had already selected their nominee, and were waiting only for the 'psychological moment' for pressing his name, but the Harding movement was too rapid for them. These were the 'Progressive Republicans,' and their nominee was to be Senator Philander C. Knox. (Told the writer by one of the Senators most concerned in this effort. See, also, David S. Barry, *Forty Years in Washington*, 248.)

mary and election campaigns. These efforts have already been set forth in the chapter on Senate Investigations.

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#### HOW THE PRESIDENT MAY SEEK TO INFLUENCE SENATE ACTION

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The President may avail himself of many methods in his effort to enlist Senate support for his executive acts or for legislative measures in which he is deeply concerned. The most formal is that of direct communication to the Senate as a body, either by address in person or by written message.

So closely did the Constitution bind the Executive and the Senate together in the exercise of the treaty-making and appointing powers that one of the Senate's earliest concerns was to determine the procedure which should be observed on the occasions — believed likely to prove frequent — upon which they should meet for such tasks.<sup>1</sup> In experience, however, these direct contacts between the President and the Senate as a body have been rare — probably not more than half a dozen in the entire period from the fiasco of Washington's trial of oral conference over a treaty in 1789 to Hoover's appearance in the Senate Chamber in 1932.

Although the Senate rules explicitly recognize the right of the President to be present whenever the Senate is in session, and accord to him a seat of honor when he 'shall meet the Senate in the Senate Chamber for the consideration of Executive business,'<sup>2</sup> Presidents have found little cordiality in that Chamber. When Wilson, a month after his first inauguration, announced his intention to address Congress in person, in the House a concurrent resolution to provide for such a meeting was at once introduced and passed without a word of debate.<sup>3</sup> In the Senate, however, this resolution called forth considerable discussion. One or two members approved of the innovation. Lodge, while disclaiming opposition to the change, commented on this reversion to the practice of the first two Presidents and read into the record Jefferson's famous letter to the Senate, December 8, 1801, in

<sup>1</sup> Pages 55–56.

<sup>2</sup> Rules XXIII and XXVI.

<sup>3</sup> April 7, 1913, *Cong. Rec.*, 75.

which he set forth his reasons for communicating with Congress by written message, thus setting the precedent which was to remain unbroken for more than a century. Williams frankly deplored the departure from Jeffersonian democratic simplicity.<sup>1</sup>

The most notable instance of a President's direct address to the Senate was Wilson's appearance in the Chamber, July 10, 1919, when he presented the Treaty of Versailles and declared himself at the disposal of the Senate or of its Committee on Foreign Relations, as the Senate might prefer. To this tender the Senate made no response, and many weeks passed before the committee in charge of the treaty put itself in direct touch with the President.<sup>2</sup>

Harding came before the Senate in 1921 and urged the postponement of action upon the Soldiers' Bonus Bill.<sup>3</sup> This called forth the sharpest of criticism. No other President, it was declared, 'during the consideration of a bill, when it was laid before the Senate as unfinished business, has come before the Senate for the purpose of advising non-action.' Though the bill — which had apparently been on the point of passing — was recommitted by a large vote, the memory of the episode still rankled. Six weeks later it became the subject of hot debate, in which a Senator whose view as to the merits of the 'Bonus Bill' was in complete accord with that of the President, nevertheless declared:

No more pitiable spectacle was ever presented to a free country than the pitiable, and intolerable, and indefensible spectacle which the Senate

<sup>1</sup> April 7, 1913, *Cong. Rec.*, 57-60.

<sup>2</sup> Page 700.

<sup>3</sup> July 12, 1921, *Cong. Rec.*, 3597-3600. A Democrat characterized the Republican Senators' yielding to the President's wishes as 'a most pitiable spectacle of complete legislative subserviency, of legislative truckling, of legislative crawling upon the belly at the feet of the master, and licking the boots of authority.' (*Ibid.*, 3885.) One editor commented: 'Senators took orders from President Wilson. They might accept suggestions from President Harding.' La Follette, ignoring the unwritten rule which forbids a member of one branch of Congress to criticize action taken by the other, said in a speech in the Senate: 'I regret to say that the House declined to consider the resolution which sought to protect its legislative prerogative, and I regret especially that by a partisan vote it laid the resolution upon the table.' 'That he [the President] should be brought into the debate upon the bill to prevent its passage in the Senate' La Follette denounced as a 'proceeding without authority under the Constitution, and supported by no precedent in the history of our Government. The founders of this Republic . . . were careful to withhold from him any express or implied authority to oppose legislation in the making, or to participate in the deliberation on a pending measure.' Two days before La Follette made this speech, at the request of the Chairman of the Committee on Appropriations there had been read a letter from President Harding, urging the passage of the Shipping Bill. This had been done, 'without objection.' To this occurrence La Follette referred: 'The President has injected into the consideration of this bill a personal letter, which is only slightly less offensive than the act which he committed in person here on the 12th day of July.' (*Ibid.*, 5416.)

of the United States presented on the Bonus Bill. . . . We surrendered our judgment to his dictation. . . . Who legislated? What became of the greatest legislative body in the world? It had become an amanuensis to record the vote of one man.<sup>1</sup>

On the last day of May, 1932, when a series of night conferences at the White House with Republican and with Democratic Senators had given no assurance of prompt action upon the long-delayed Tax Bill, President Hoover took the sensational step of going to the Senate Chamber, without notice, to present his plea in person. For six months, during the worst crisis the country had ever known, both House and Senate had seemed to be playing politics, as if there were no emergency.<sup>2</sup> 'Time,' he urged, 'is of the essence. Every day's delay makes new wounds and extends them.' He closed with this admonition:

In your hands at this moment is the answer to the question whether democracy has the capacity to act speedily enough to save itself in emergency. The Nation urgently needs unity. It needs solidarity before the world in demonstrating that America has the courage to look its difficulties in the face and the capacity and resolution to meet them.

Ten years had passed since a President had come before the Senate to urge his views upon a pending measure, and his intervention in that instance had been bitterly denounced. But in this case every Senator knew that in his plea for action President Hoover voiced the earnest desire of the American people, utterly tired of indecision and delay. Debate at once became more vital and sincere. The President did not succeed in persuading the Senate to adopt his precise proposals. But he did get action, in place of endless talk, so that within six weeks agreement was reached upon a relief bill which he could sign.

From Washington's time to the present, Presidents have made a practice of conferring with Senators, especially with the official Senate leaders of their own party and with the chairmen of committees

<sup>1</sup> Borah, Aug. 22, 1921, *Cong. Rec.*, 5422. Reference was made in this debate to Wilson's precedents in addressing the Senate, Jan. 22, 1917 (*ibid.*, 1741), on a League of Nations for Peace (*supra*, 694), and Sept. 30, 1918, to urge passage of the Woman's Suffrage Amendment resolution (*Cong. Rec.*, 10928-29). It is to be noted that in the ordinary procedure a President has nothing to do with an amendment, as it comes to him neither for signature nor veto. In the House, Cochran vigorously denounced the President (Harding) for addressing only the Senate and not Congress on a legislative measure. H. Res. 177 and 200, Oct. 14, 1921, *ibid.*, 5258; 6349.

<sup>2</sup> The day before, Senator Neely had told his colleagues that the eloquence of their 'indefatigable, inexhaustible, and irrepressible orators' was losing the Government more than \$83,000 an hour, and that 'no member would solemnly assert that a single vote has been lost or won by anything that has been said in the course of the twelve hours of day and night debate which has been held here in the last twelve days.'

handling important measures. To confer, or not to confer, has proved an embarrassing question. Rarely has a President escaped criticism; on the one hand, he is berated for interference; and on the other, for holding himself aloof. In the early part of his first term, Wilson showed a disposition to break long-standing precedent by going often to the President's Room, close to the Senate Chamber, for conference with Senate leaders upon pending measures. Although the provision of this room for conference was in entire accord with Washington's express wish and anticipation,<sup>1</sup> most Presidents have visited this room hardly at all except in the closing hours of a Congress, when they have gone there to be at hand for the signing of bills.

In winning the support of individual Senators the President may rely not only upon logic and the appeal to personal or party loyalty, but he may employ persuasive 'practical' arguments in the form of appointments tendered to 'lame-duck' Senators, or patronage for Senators' friends in return for votes for his favorite projects. From the days of Maclay to the present, cynics have scanned with interest the list of guests at state dinners and other social functions, for a Senator's wife may hold in everlasting remembrance an invitation to dine at the White House or to be a week-end guest on the *Mayflower*.

While many invitations to the President's table are official and perfunctory, others often have important political significance.<sup>2</sup> President Harding's dinner, February 7, 1922, to members of the Republi-

<sup>1</sup> 'Whenever the Government shall have a building of its own, an Executive chamber will no doubt be provided, where the Senate will generally attend the President.' Washington's statement to Senate Committee, *Works*, XI, 418.

In later years of his Presidency, Wilson came to this room but seldom. The room has seen strange contacts between Presidents and Senators. On the last day of his first term, President Wilson was there, to sign bills, and attend to other matters connected with the closing of the session. In accordance with traditional usage, Senate leaders, regardless of party, came informally to pay their respects. The President happened to be standing in the middle of the room when Senator Lodge approached and extended his hand. Mr. Wilson turned on his heel, without recognition, and walked to the near-by window, and stood with his back to Mr. Lodge and the entire room, until the Senator, without comment, walked away. A little later, Senator Chamberlain, Chairman of the Committee on Military Affairs and during the past session an open opponent of many of the President's policies, approached the President and extended his hand with a word of greeting. The President glanced coldly at him, ignored the extended hand, and deliberately turned his back on him and began conversation with one of his secretaries. 'Those were days when feeling was running high, and Mr. Wilson was not of a temperament that could tolerate opposition.' (Mrs. George F. Richards, a member of the press gallery, and an eye-witness of the incident, in *Worcester Evening Gazette*, May 12, 1932, and letter to the writer, May 22, 1933.)

<sup>2</sup> The most notable dinner conference was doubtless the one for which President Wilson made arrangements from Paris by cable, that he might discuss with the members of the Senate and House Committees concerning the tentative draft of the covenant of the League of Nations (p. 697).

can Steering Committees in both Senate and House was obviously intended to promote team-play in relation to the party's legislative program. A luncheon at the White House may bring together the members of a Senate committee and outside experts in the field of its work. President Coolidge developed the White House breakfast into a political institution. For example, on the opening day of a session of Congress he had as guests at a breakfast conference a dozen and more Senators, each a chairman of one of the more important committees.<sup>1</sup> This attempt to get an advance survey of the session's work was followed in the opening week by two other breakfasts with Senate members of his party, and a little later in the session by similar conferences with Republican leaders in the House. These White House breakfasts have been the subject of much banter, but they have distinct advantages. At the beginning of the day, while his guests are still fresh, the President as Chief Executive or as leader of his party gathers about his table men who have a common concern in some problem. This may be talked over candidly in the aroma of sausage and coffee, and by the time the cigars are making the second round, the approach of the regular hour for committee meetings puts a natural termination to the discussion, leaving both the President and his guests free for the day's work.

For presenting the Administration's point of view upon measures pending in the Senate some individual Senator often comes to be regarded as the President's spokesman. In the Sixty-Ninth Congress Senators naturally attached special significance to the words and votes of Butler, the President's close friend and campaign manager, who had been Coolidge's personal selection for the chairmanship of the Republican National Committee, and who still held that influential position. Coolidge later insisted that he had never had spokesmen in Congress other than those chosen by the party's members in Senate and in House. A dual leadership, attempted by the President's personal representative and by the leader chosen by the party conference, could not fail to cause friction and strain. Wilson depended largely upon conference with the Democratic Senate leader, or with committee chairmen, but on the most critical occasions he communicated his views to the Senate in the form of personal letters. It was in this manner that he twice gave his advice that the Treaty of Versailles, bearing the Lodge reservations, should not be ratified.<sup>2</sup>

<sup>1</sup> Dec. 1, 1924.

<sup>2</sup> Pages 702-03. Note also the letter read by Overman in the Senate, April 22, 1918, in regard to the Chamberlain 'Court Martial Bill,' which the President characterized as not only 'unnecessary and uncalled for,' but as 'unconstitutional.'

Since Theodore Roosevelt's day it has become the habit of the American people to look more and more to the President rather than to Congress for leadership. The result is that a President's greatest influence on the Senate may be exerted indirectly through an appeal to the ultimate master, public opinion. Roosevelt was an adept in the use of this appeal, and sometimes acted with startling swiftness. One morning, while a fight over the provisions of a railway rate bill was in progress in the Senate, Roosevelt was shown a copy of a telegram which had been sent by the attorney of the Standard Oil Company to certain Senators, suggesting to them how to vote on a particular clause of that bill. 'The newspaper account of that incident created a world-wide sensation, and blocked the attempt of those who sought to amend the bill in behalf of certain interests. And the man who gave the story to the press and who wrote the preliminary news item that was sent to the afternoon papers was the President of the United States himself.'<sup>1</sup> In 1918, when in a public speech the Democratic Chairman of the Senate Committee on Military Affairs declared that the 'military establishment of the United States had broken down because there was inefficiency in every bureau,' Wilson not only summoned to the White House Democratic leaders from both branches of Congress to counsel with them upon plans to defeat Chamberlain's 'War Cabinet Bill,' but he issued a formal statement to the press, denouncing Chamberlain's assertions and defending the Administration's conduct of the war.<sup>2</sup>

During the war, when the pressure for news became extreme, Wilson initiated the custom of meeting a large group of representatives of the press at a stated hour or by appointment, and presenting to them informally such matters of public interest as he considered warranted. Harding and Coolidge continued this practice, finding in it opportunities which may not at first have been suspected. At such press conferences the President is the judge of what matter shall be discussed, and of the point at which the public interest determines that disclosure shall stop. Furthermore, it is a convention of honor that the President

<sup>1</sup> D. S. Barry, *Forty Years in Washington*, 271.

<sup>2</sup> Chamberlain's speech before the National Security League and the President's statement in defense of the war administration are reprinted in the *Congressional Record*, 1194–1211, Jan. 24, 1918, as a preface to the Senator's arraignment of the War Department. More effective than the President's action was the course pursued by Secretary Baker. At his request a hearing was arranged at which the Senate and House members could all be present. Of his address Carter Glass said: 'Never in all my life did I see, nor ever shall I hereafter see, an honest man acquit himself with such credit, with such courage, with such tact.' *Ibid.*, 6358, April 15, 1924.

shall not be directly quoted. Hence, in the Washington dispatches such periphrases constantly recur as, 'The President's spokesman says,' or, 'At the White House it is said,' or, 'One intimate with the Administration declares,' etc. The result is that behind this thin screen the President can carry on most active and biased propaganda for himself or for any measure which he favors. He may use this device to feel the public pulse. If the reaction is unfavorable, no direct criticism hits him, for the statement was unavowed. The development and manipulation of this device for personal propaganda deserve vigilant attention. Professor Lindsay Rogers cited repeated instances where loose or one-sided statements, actually made by the President, led to serious embarrassments and the threat of international complications; and he insisted that it is to the last degree essential that no curb be placed upon the Senate's power of investigation, in order that the people may be assured of this one check and challenge upon propagandist utterances issuing from 'the White House' in a form which enables the President to evade responsibility.<sup>1</sup> In the Senate Chamber 'the President's spokesman' has been the target of severe criticism and derision, and newspapers, which perforce published the 'spokesman's' statements, editorially deplored the childish shiftiness of this masquerade.<sup>2</sup>

A President with the courage of his convictions in a worth-while cause does not seek to hide behind a nameless 'spokesman.' When Woodrow Wilson found Senate hostility threatening to defeat America's entering the League of Nations, he set up no puppet show at the White House, but started to plead his cause, face to face with the people in the great cities of the land. When the hue and cry were in full course in the Senate oil investigations, Calvin Coolidge did not hunt for a 'spokesman,' but in his own person declared:

For us we propose to follow the clear, open path of justice. There will be immediate, adequate, unshrinking prosecution, criminal and civil, to punish the guilty and to protect every national interest. In this effort there will be no politics, no partisanship.<sup>3</sup>

The development of radio has placed at the President's command an enormously effective weapon for either offensive or defensive war-

<sup>1</sup> *The American Senate* (1926), *passim*.

<sup>2</sup> 'I have learned that the "White House Spokesman" is even a more authentic source of information as to the presidential mind than the President himself, if such a thing is possible. . . . Let us have done with this sham and this miserable, boyish, childish attitude of mind.' J. A. Reed, in Senate debate, quoted by *Time*, Feb. 7, 1927.

<sup>3</sup> Speech at Lincoln Day dinner, New York City, Feb. 12, 1924. See also his statement to the press, of the same date. Both reprinted in *Cong. Rec.*, Feb. 13, 1924.

fare. 'Mechanical inventions may make a greater revolution in the powers of the President than a constitutional amendment.' So commented Doctor Charles A. Beard in 1924.<sup>1</sup> Had broadcasting been made as effective in 1919 as it had already become five years later, instead of wrecking his life in the tragic attempt to present in person his pleas for the League of Nations in the great cities from the Atlantic to the Pacific, President Wilson, from his desk in the White House, with his own voice could have made his appeal to tens of millions of his countrymen, and — for better, for worse — one of the most momentous decisions in America's history might have been reversed.<sup>2</sup>

The astonishingly large rôle which radio has played in later presidential campaigns, its effectiveness for propagandist purposes both for and against a candidate or a measure pending in Congress, and the tremendous advantage which the Administration enjoys in the divers controls and influences which it can exercise 'over the air,' are among the most striking phenomena of present-day politics.

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#### PRESIDENTS' CENSURE OF THE SENATE

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However salutary a system of checks and balances may have been thought to be, experience soon showed that it must often prove irksome and productive of antagonism. Friction has oftenest arisen over the contacts, made compulsory by the Constitution, as to appointments and removals and the making of treaties.<sup>3</sup>

<sup>1</sup> C. A. Beard, *American Government and Politics* (1924), 190.

<sup>2</sup> In the long controversy over radio control, the Senate insisted that the control be exercised, not by the Department of Commerce, but by an independent commission. The reasons for this insistence were popularly believed to be the Senators' desire to have a share in determining the appointments to five high-salaried positions on a commission which would soon develop a staff that would call for \$1,000,000 in salaries, and the well-grounded fear that radio might become an almost decisive factor in elections, with immense advantage to the Administration if under its control. In illustration of what they feared, it was alleged that in the 1924 campaign La Follette was not allowed to broadcast his Des Moines speech, though ready to meet its expense. In the Communications Act of 1934 the Senate won its point: the regulation of 'inter-state and foreign communications by wire or radio' is vested in an independent commission — the Federal Communications Commission.

<sup>3</sup> Presidents' strictures upon Senate action in relation to these matters have been discussed, *supra*, 762 ff., 793 ff. When a Senator was expressing resentment at a rebuke

President Polk was urged by the Secretary of State, Buchanan, to insert in a special message to the Senate an implied but strong censure of that body for not having 'passed the Notice' as to the Oregon matter then in controversy with England. Polk declared that he thought the Senate's delay was censurable and that it had embarrassed the situation, but he added: 'It was not my duty or province to lecture the Senate for it.'<sup>1</sup>

Other Presidents have not hesitated to 'lecture' the Senate. Sometimes the admonition has been communicated in conversation or by letter, which, though addressed to an individual, has speedily found its way to the public. In 1894, under Gorman's leadership Senate protectionists, Democratic as well as Republican, amended the Wilson Tariff Bill to suit their purposes. In a letter to Representative Wilson, the author of the bill and the chairman of the conference committee before whom the bill was then pending, President Cleveland referred to the original measure as one

which in its promise of accomplishment is so interwoven with Democratic pledges and Democratic success that our abandonment of the cause or the principles upon which it rests means party perfidy and party dis-honor.<sup>2</sup>

The publication of this letter produced a sensation. In a speech of angry protest, Gorman characterized it as 'the most extraordinary, the most uncalled for, and the most unwise communication that was ever penned by a President of the United States,' and declared that its being read by Wilson in the House had 'placed this body [the Senate] in a position where its members must see to it that the dignity and honor of this Chamber shall be maintained.'<sup>3</sup>

President Wilson repeatedly resorted to the issuing of a public statement from the White House with the intent to bring public sentiment to bear upon the Senate. This was done with tremendous effect immediately after the expiration of the Sixty-Fourth Congress with the bill for arming merchant ships still held in the grip of a Senate filibuster, though seventy-five of its members had signed a declaration

which Jackson had sent to the Senate, J. Q. Adams reminded him that misunderstandings had repeatedly arisen between the President and the Senate, in the course of which Washington, Madison, and he himself had taken occasion, by special message, to criticize the Senate. *Memoirs*, VIII, 329; IX, 51, 57.

<sup>1</sup> *Diary*, March 17, 1846.

<sup>2</sup> *Cong. Rec.*, 7712-13, July, 1894.

<sup>3</sup> Speech of July 23, 1894. The conference committee was so constituted that Gorman won; the bill became a law precisely as he and his friends had rewritten it (p. 430). David S. Barry, *Forty Years in Washington*, 196.

that they would have voted for the measure if an opportunity to do so could have been secured. Forthwith the President issued his denunciation of 'the little band of wilful men' who had thwarted the purpose of the great majority of the Senate, and he called upon the Senate to reform its rules.<sup>1</sup> In the Senate the statement was angrily stigmatized as 'unparalleled and unprecedented,' and 'little less than an outrage.' Had the question not been one of international concern, it was declared, such criticism of the Senate by the President would probably have been made the subject of a Senate investigation. But the significant fact is that March 8, 1917, only four days after the issuance of the White House statement, by a vote of 76 to 3, after but six hours of debate, the Senate for the first time in more than a century put a curb upon debate by the adoption of a cloture rule.<sup>2</sup>

In the closing weeks of the presidential campaign of 1920, the Republican candidate, Senator Harding, issued the following statement:

If a Republican administration is chosen next November, you can be very certain that the Senate will have something to say about the foreign relations as the Constitution contemplates. I had rather have the counsel of the Senate than all the political bosses in any party. I want to have done with personal government in this country. I want to put an end to autocracy, which has been reared in the name of democracy.<sup>3</sup>

Harding's early disposition to seek 'the counsel of the Senate' was shown in his formal message to the Senate, February 17, 1922, asking its advice whether a new patents treaty with Germany should be negotiated or whether the treaty of 1909 should be revived by executive request. Since the days of Washington very rarely had a President sought Senate advice upon a question of foreign policy before taking action.<sup>4</sup> Yet in less than a year from his inauguration Harding found himself constrained to refuse to comply with the Senate's request for information as to the negotiations leading up to the Four-Powers Treaty — negotiations conducted as secretly as those to which Wilson had been a party at Paris. Before the end of another year, Harding —

<sup>1</sup> Colonel House urged the issuance of such a statement. *Intimate Papers of Colonel House*, II, 457-58.

<sup>2</sup> Pages 402 ff.

<sup>3</sup> This statement, published in the *Cincinnati Commercial Tribune*, evoked much editorial comment. Critics spoke of it as an advance abdication in favor of the Old Guard Senators to whom he owed his nomination.

<sup>4</sup> Pages 585 ff.

who as a candidate for the Presidency had professed such eagerness for the 'counsel of the Senate' — was 'lecturing' the Senate upon the 'seemliness' of its members' making proper inquiry at the State Department as to what was actually being done, before advising the Executive, by resolutions or treaty amendments, how to conduct the nation's foreign affairs. With a new sharpness of tone he intimated that if the Senate were eager to aid in the solution of the economic problems which were burdening both America and Europe, without wasting time on matters reserved to the constitutional prerogative of the President, it might do the things which were within its own competence — consent to the representation of the United States upon the Reparations Commission and 'free the hands of the Commission so that helpful negotiations may be undertaken.'<sup>1</sup>

In the first Coolidge Administration many months of controversy culminated in a message to the Senate vigorously asserting the duty of the Executive to resist unwarranted intrusion by the Senate, and declaring to that body: 'It is time that we returned to a government under and in accordance with the usual forms of the law of the land.'<sup>2</sup>

Appalled by the introduction in the first week of the session of 'relief bills' which would involve expenditures totaling nearly \$4,500,000,000 beyond those which he had recommended, President Hoover, December 9, 1931, issued a statement in which he charged that some of the sponsors for these relief bills were 'playing politics at the expense of human misery.... Prosperity cannot be restored by raids upon the Treasury.' This public denunciation, without prior warning or conference with congressional leaders, caused not a little resentment among Senators, a large group of whom, through the majority leader, intimated to the President their feeling that when he sought co-operation from Congress, conference should precede denunciation. May 7, 1932, the President again appealed for the country's support in his

<sup>1</sup> See President Harding's address to a joint session of the Senate and House: 'I am not seeking now to influence the Senate's decision, but I am appealing for some decision.' Feb. 7, 1923, *Cong. Rec.*, 3214.

<sup>2</sup> Message of April 11, 1924. See article by Frederick W. Wile (inserted in *Cong. Rec.*, 4025, March 12, 1924), 'Congress Inaction is Irking Coolidge,' with citation of 'The Power of Congress to Investigate the Executive,' by Abraham F. Meyers, in Georgetown University *Law Journal*, Nov., 1923, presenting evidence that from 1789 to 1921 (the end of the Chief Justiceship of Edward Douglas White) 'our Presidents and our highest tribunal have consistently maintained the independence of the Executive as against the interference of the legislative branch.'

An admirable study of this subject is 'Presidential Declarations of Independence,' by Charles Warren, in the Boston University *Law Review*, Jan., 1930.

efforts to balance the budget. He insisted that this was not a partisan issue, and that immediate action was urgently required.

This is not a controversy between the President and Congress or its members. It is an issue of the people against delays and destructive legislation which will impair the credit of the United States. It is also an issue between the people and the locust swarm of lobbyists who haunt the halls of Congress seeking selfish privilege for special groups and sections of the country, misleading members as to the real views of the people by showers of propaganda.

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#### SENATE CRITICISM OF THE PRESIDENT

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In the Senate criticism of the President or protest against alleged encroachment by the Executive may take many forms. In the first place, the Senate rules place no curb in Senate debate upon denunciation, however ribald or rancorous, of the President of the United States, and the individual Senator may thus vent his partisanship or personal antagonism.<sup>1</sup>

By its votes, especially to defeat measures which the President has urged, or to override his vetoes, the Senate, like the House, may record its disapproval and administer a warning.

Ordinarily, when opposition to the President is developing in the Senate, no formal vote of censure is passed, but a resolution may be adopted, calling upon the President or the head of a department for information as to the matter in question, or providing for an investigation of the Executive's alleged offenses by a Senate committee.

<sup>1</sup> Page 389. In the House the proper limits of criticism of the President in debate have received serious consideration. A special committee, taking into consideration House members' immunity from having their speeches 'questioned' outside of the House, and also the fact that the House alone can bring impeachment charges against the President, declared: 'It becomes especially the duty of the House itself to protect the President from that personal abuse, innuendo, or ridicule tending to excite disorder in the House and to incite personal antagonism on the part of the President toward the House, and which is not related to the power of the House under the Constitution to examine into the acts and conduct of the President.' The committee unanimously recommended that the entire speech of a New York Representative — which one member characterized as 'full of reflections upon the President which seems to constitute a breach of privilege of the House' — be stricken from the permanent *Record*. Without dissent, this was done. Jan. 27, 1909, *Cong. Rec.*, 1105-07; 1465.

Recognizing a hostile intent in such action, the President may decline to comply with the request for information,<sup>1</sup> or he may exercise every form of influence to delay or defeat a pending resolution for a committee of investigation.<sup>2</sup>

In two notable instances, oft-repeated requests and demands for papers and other information upon the basis of which certain officials had been removed led the harried President, not only to refuse compliance with the demands, but to denounce the attempts at encroachment of the rights of the Executive which they evidenced.<sup>3</sup>

In a few cases the Senate by formal resolution has censured the action of the President himself. Most notable, because of the personalities involved and because of the sequel, were the resolutions relating to Jackson's 'removal of the deposits.' Upon Clay's motion, December 11, 1833, the Senate requested the President to communicate to the Senate a copy of the paper relating to that subject 'which purports to have been read by him to the heads of the Executive Departments.'<sup>4</sup> Although this paper, signed by the President, had been given immediate publicity by him several months before this request was made, he now replied by special message to the Senate:

I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communications, either verbally or in writing, made to the heads of Departments acting as a cabinet council.

While professing his willingness on all proper occasions to give to the Senate any information in his possession that could be 'useful in the

<sup>1</sup> As early as 1790 there was asserted in the Senate 'the right of any member of Congress to any papers in any office whatever.' Maclay, *Journal*, May 13, 1790. See Hamilton's reply, *ibid.*, 262. John Quincy Adams's views upon compliance with such requests, *Memoirs*, VII, 107, 111. For compilation of data as to 'Right to Demand Papers on the Executive Files,' see G. P. Furber, *Senate Precedents*, 232 ff.; 'Congressional Demands upon the Executive for Information,' by Edward C. Mason, *Report, American Historical Association* (1890), 71-72. Often such requests have been refused on the ground that compliance would not be 'compatible with the public interest.'

<sup>2</sup> President Cleveland, at one stage in the controversy with England over Venezuela, wrote to Olney: 'I could not be hurried in the matter even if Congress should begin grinding again the resolution-of-inquiry mill.' (R. McElroy, *Grover Cleveland*, II, 183.) May 15, 1918, Wilson by letter to one Senator objected to any investigation of the 'general conduct of the war' by a Senate committee; the following day, through another Senator with whom he had conferred, he made it known that he should expect every supporter of the Administration to vote against the Chamberlain resolution authorizing certain investigations by the Committee on Military Affairs.

<sup>3</sup> Pages 796, 808. Jackson, Message to Senate, Feb. 2, 1835; Cleveland, Message to Senate, March 1, 1886.

<sup>4</sup> *Senate Journal*, 40-41, Dec. 11, 1833.

execution of the appropriate duties' confided to it, he declared himself constrained by a proper sense of my own self-respect, and of the rights secured by the Constitution to the Executive branch of the Government, to decline a compliance with your request.<sup>1</sup>

A few days later, Clay introduced two resolutions declaring that in the procedure by which the President had forced the removal of the deposits 'the President has assumed a power over the treasury of the United States not granted to him by the Constitution and laws, and dangerous to the liberties of the people'; and that the reasons assigned by the Secretary of the Treasury for the removal, communicated to him by Congress, 'are unsatisfactory and insufficient.' For two days Clay passionately urged the adoption of these resolutions.<sup>2</sup> During the following month they were debated at great length. Benton protested that in fact the first of these resolutions was 'a direct impeachment of the President of the United States.'

Every Senator, in voting upon it, would vote as directly upon the guilt or innocence of the President, as if he was responding to the question of guilty or not guilty in the final scene of a formal impeachment.<sup>3</sup>

Finally the Senate adopted modified resolutions declaring that the reasons assigned for the removal of the deposits were 'unsatisfactory and insufficient,' and that the President in these proceedings 'has assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both.'<sup>4</sup>

In a message of April 17 to the Senate the President with great vigor protested against this resolution which he declared was in substance an impeachment.

The President of the United States, therefore, has been by a majority of his constitutional triers, accused and found guilty of an impeachable offense; but in no part of this proceeding have the directions of the Constitution been observed. . . .

I do SOLEMNLY PROTEST against the above-mentioned proceedings of the Senate, as unauthorized by the Constitution; contrary to its spirit and to several of its express provisions; subversive of that distribution of

<sup>1</sup> *Messages*, III, 36; Benton, *Thirty Years' View*, ch. LXVII, 399 ff.; J. Q. Adams, *Memoirs*, IX, 60.

<sup>2</sup> *Cong. Debates*, 94, Dec. 30, 1833.

<sup>3</sup> *Ibid.*, 98, Jan. 2, 1834.

<sup>4</sup> March 28, 1834. By votes of 28 to 18; and 26 to 20. Benton declared that they were placed in the *Journal* simply for popular effect. 'These resolutions might lie in the Senate *Journals* till doomsday, and neither the President nor the House could legally, regularly or in any parliamentary way know of their existence.' *Cong. Debates*, 1192, March 29, 1834.

the powers of Government which it has ordained and established; destructive of the checks and safeguards by which these powers were intended, on the one hand to be controlled, and, on the other, to be protected; and calculated, by their immediate and collateral effects, by their character and tendency, to concentrate in the hands of a body not directly amenable to the people, a degree of influence and power dangerous to their liberties and fatal to the Constitution of their choice.

He closed with a respectful request 'that this message and protest may be entered at length on the Journals of the Senate.'<sup>1</sup>

A motion that 'this paper, sent to the Senate by the President of the United States, be not received' was at once introduced and angrily advocated. On twelve days this motion was under debate, many members participating. It was finally adopted in a series of resolutions on each of which the vote was 27 to 16.<sup>2</sup>

<sup>1</sup> *Messages*, III, 36. J. Q. Adams commented on the President's assertion that the Senate's resolution of censure was 'unprecedented': 'It is true that no such resolution ever passed before; it is also true that no such resolution ought ever to pass that body.' But precisely similar resolutions have been introduced and debated on more than one occasion. He cited the Gore resolutions upon the appointment of ministers for the Russian Mediation Mission (Feb. 28, 1814, *Cong. Debates*, 651-57; 741-59) and the Branch resolutions (March 30, 1826, *ibid.*, 404). In both cases censure was passed upon action by the President which the resolutions declared not within the constitutional competency of the Executive.

<sup>2</sup> May 7, 1834. The first declared that the President's protest asserted powers as belonging to the President which were inconsistent with the just authority of the two Houses of Congress, and inconsistent with the Constitution of the United States; the second, that the Senate could not recognize any right of the President to 'make a formal protest against votes and proceedings of the Senate, declaring such votes and proceedings to be illegal and unconstitutional, and requesting the Senate to enter such protest on its Journals'; the third, 'that the aforesaid protest is a breach of the privileges of the Senate, and that it be not entered on the Journals'; the fourth (which had been added on Calhoun's motion); 'that the President of the United States has no right to send a protest to the Senate against any of its proceedings.' (*Journal*, 252-53, May 8, 1834.)

A few years later, this refusal to 'receive' Jackson's protest was made to serve as a precedent under dramatic circumstances. In August, 1842, irritated by the action of the House upon his tariff veto messages, President Tyler sent to the House a special message in which under six heads he protested against its proceedings, and respectfully asked that the protest be 'entered upon the Journal of the House as a solemn and formal declaration for all time to come against the injustice and unconstitutionality of such a proceeding.' (*Messages*, IV, 190-93.) The next day, Botts read in the House the above resolutions adopted by the Senate in 1834. After calling attention to the fact that among the 'yeas' for each stood the names of 'John Tyler, now acting President of the United States, and Daniel Webster, now his Prime Minister,' and after quoting at length from Webster's speeches of 1834 justifying the Senate's refusal to receive the President's protest, he offered three resolutions in the precise words of those for the adoption of which John Tyler himself had then voted. These were forthwith adopted by votes of nearly two to one. By a narrow majority the House defeated a fourth resolution, that 'the Clerk be directed to return the message and the protest to its author.' (*Cong. Globe*, 973-75, Aug. 30, 1842; Benton, *op. cit.*, II, 419.) Compare with the angry debate and the indignant resolutions adopted by the House, by a vote of nearly six to one, Jan. 8, 1909, declining 'to consider any communication from any source which is not in its own judgment respectful,' and laying President Roosevelt's message upon the table. (*Cong. Rec.*, 645-84.)



**FACSIMILE** of Mr. Benton's original *Expunging Resolution*  
(without the preamble) passed by the Senate of the United States, Jan<sup>o</sup> 16<sup>th</sup> 1837

Resolved, That the said Resolved be expunged from the Journal and, for that purpose, that the Secretary of the Senate, at such time as the Senate may appoint, bring the manuscript Journal of the Session 1833-34, into the Senate, and, in the presence of the Senate, draw black lines round the said Resolved, and write across the face thereof, in stamp letters, the following words: "Expunged by order of the Senate, this 16<sup>th</sup> day of January in the year of our Lord 1837."

**FACSIMILE** of the EXPUNGED RESOLUTION  
of the U.S. Senate, as it appears in the Record of the Senate, of March 28 1834

~~Resolved~~ ~~that the President in the late~~  
~~Executive proceedings in relation to the public~~  
~~revenue, he assumed upon himself~~  
~~authority and power not conferred by the~~  
~~Constitution and laws, but in derogation~~  
~~of both.~~

These facsimiles are reproduced from a lithograph now preserved in the Rare Book Room of the Library of Congress. The date of acquisition and source are unknown. It is probably a copyright copy. On the lithograph beneath the facsimiles are presented the lists of Senators who voted for and against the resolution.

Many years ago it was discovered that the section of the original manuscript *Journal of the Senate* which bore this 'Expunged Resolution' had disappeared. Repeated and prolonged search in the Senate Wing has found no trace of that authoritative record of one of the most dramatic scenes ever witnessed in 'The Old Senate Chamber.'

The members of the Great Triumvirate — Webster, Clay, and Calhoun — all spoke and voted for these resolutions. Benton at once gave notice of his intent to move an expunging resolution, and to prosecute it irrevocably until he should secure its adoption. To that vow he held himself with the grim determination of a Cato. At first regarded as an idle threat, it was renewed, session after session. In increasing numbers there came from state legislatures instructions to their Senators ‘to use their untiring efforts to cause to be expunged from the Journal of the Senate the resolve condemnatory of President Jackson.’ By the end of 1835 five states had given such instructions. Twelve months later, either by adopting such resolutions, or by superseding Senators who had given the obnoxious votes in 1834, a majority of the states had ‘revealed the public voice, and in an imperative form.’<sup>1</sup>

Early in the last session of Jackson’s Presidency, Benton for the last time introduced his motion. Preceded by a long series of ‘Whereases,’ it ended thus:

And Whereas the said resolve is of evil example and dangerous precedent, and should never have been received, debated or adopted by the Senate, or admitted to entry upon its Journal: Wherefore,

*Resolved*, That the said resolve be expunged from the Journal, and, for that purpose, that the Secretary of the Senate, at such time as the Senate may appoint, shall bring the manuscript journal of the Session 1833–’34 into the Senate, and, in the presence of the Senate, draw black lines round the said resolve, and write across the face thereof, in strong letters, the following words: ‘Expunged by order of the Senate, this 16th day of January, in the year of our Lord 1837.’

At the end of four days of heated debate, foreseeing the inevitable, Calhoun said:

The day is gone; night approaches, and night is suitable to the dark deed we meditate.... This act originates in pure, unmixed, personal idolatry.

The resolution was agreed to by a vote of 24 to 19. The manuscript *Journal* was brought into the dimly lighted Chamber, and the ‘expunging’ was carried into effect, in the manner which the resolution required. No sooner had this been done than hisses, loud and repeated, were heard from various parts of the gallery where ‘the bank ruffians’ were seated. The Chair ordered the gallery cleared, but Benton suggested that only the ‘ruffians’ who had caused the dis-

<sup>1</sup> Benton, *op. cit.*, I, 717.

turbance be ejected; and he designated one, who should be brought to the bar of the Senate. When the Sergeant-at-Arms presented this offender, Benton moved that he be discharged from custody, and this was carried with but one dissenting vote, and he was declared discharged. Obviously disappointed at so tame an ending of the demonstration, he advanced, and, addressing the Chair, said: 'Mr. President, am I not to be permitted to speak in my own defense?' But the Chair's only response, addressed to the Sergeant-at-Arms, was: 'Take him out!' The Senate then adjourned. This hard-won victory after three years of struggle brought pleasing vindication to Jackson in the closing weeks of his turbulent Presidency. Benton's persistence had made the people recognize the personal hostility back of the attack upon the President. They were no longer disposed to follow blindly a Senate vote of censure.<sup>1</sup>

In 1871, Sumner, backed by Schurz, made a bitter attack upon President Grant in a series of nine resolutions dealing with his employment of the Navy. The harshest charge took the form:

The employment of the Navy, without authority of Congress, in acts of hostility against a friendly foreign nation [Haiti], or in belligerent intervention in the affairs of a foreign nation, is an infraction of the Constitution of the United States and a usurpation of power not conferred upon the President.

In three days' debate the President's opponents denounced his acts, but, to their chagrin, the resolutions were then tabled by a heavy vote.<sup>2</sup>

In the closing days of Theodore Roosevelt's Presidency, he brought upon himself bitter censure in both branches of Congress. The House tabled certain portions of his messages which it deemed disrespectful and affronting.<sup>3</sup> For months the Senate debated resolutions denouncing Roosevelt's instructions to his Attorney-General to refrain from action against the United States Steel Corporation for its absorption of the Tennessee Coal and Iron Corporation, he having given assurance that prosecution would not be instituted. Anticipating a demand for information as to this merger, the President called for and received all of the files connected with the case, and by his instruction the

<sup>1</sup> J. S. Bassett, *Life of Andrew Jackson*, II, 524-50, 654-55. The story of the 'expunging resolution' is told in detail by Benton, *op. cit.*, ch. 161. For the closing scene, see *Cong. Debates*, 428-506, Jan. 16, 1837. In December, 1842, Bayard, acting under instructions, urged the rescinding of this expunging resolution, without success. *Ibid.*, 41, Dec. 12.

<sup>2</sup> By a vote of 39 to 16. March, 1871, *Cong. Rec.*, 294-305; 314-16; 327-29; Appendix, 62-67.

<sup>3</sup> Jan. 8, 1909, *Cong. Rec.*, 645 ff.

Attorney-General declined to furnish data and documents requested by the Senate committee designated to investigate that merger. Seven members of the committee signed the report declaring that the President, without authority of law, sanctioned the aforesaid merger made in violation of the Sherman Anti-Trust Law. Two other members attached to the report individual views minimizing the force of the declaration, and several others dissented. The committee's disagreement was reported. The end of the session and of Roosevelt's term of office, a few days later, prevented further action.<sup>1</sup>

In 1912, the Senate did itself little credit by passing resolutions intended as a rebuke to President Taft and as a warning to his successors. The occasion for this rebuke was found in a personal letter from President Taft to Colonel Roosevelt, a copy of which came under the eye of Senator Bailey. In that letter Taft declared his conviction, based on a careful study of the evidence, that 'there was a mass and a mess of corruption upon which his [Lorimer's] election was founded that ought to be stamped with the disapproval of the Senate.'<sup>2</sup> He told of conversations with divers Senators, and expressed the belief that 'we are going to line up a good many of the regular Republicans on the side of what I consider decency and honesty in politics.' Though keenly anxious that Lorimer be ousted, nevertheless, at Borah's suggestion, Taft wrote this letter to Roosevelt suggesting that the publication of a vigorous article — which he (Roosevelt) was said to be preparing — on the Lorimer question be delayed until speeches by Lorimer's opponents in the Senate should lead up to it, lest the Senate's *amour-propre* be hurt by what might be resented as outside interference. Precisely what Borah had anticipated came to pass. Ignoring the obvious fact that the President is the man upon whom party responsibility is inevitably most sharply focused, and that Senators day by day are in personal conference with him, and that this private letter, as Borah himself attested, was written upon a Senator's advice with the intent that no fancied slight to the Senate's self-esteem might jeopardize a result which the President thought demanded by 'decency and honesty in politics,' Bailey and his adherents appealed with such success to the Senate's wounded dignity that by a vote of 35 to 23 there was adopted a resolution:

That any attempt on the part of a President of the United States to exercise the powers and influence of his great office for the purpose of

<sup>1</sup> 1909. S. Res., 248; 282. Debate, *Cong. Rec.*, 839-54; 1679; 1762-65; 2029.

<sup>2</sup> For discussion of the Lorimer case, see pp. 91 ff.

controlling the vote of any Senator upon a question involving a right to a seat in the Senate, or upon any other matter within the exclusive jurisdiction of the Senate, would violate the spirit, if not the letter, of the Constitution and invade the rights of the Senate.<sup>1</sup>

President Coolidge's message of April 11, 1924,<sup>2</sup> protesting against the extraordinary methods employed by a Senate committee investigating the Bureau of Internal Revenue, called forth a storm of denunciation in the Senate. By some his message was declared to be 'a rebuke to the Senate of the United States by the President for having instituted the investigation which is now in progress.'<sup>3</sup> Another said, 'without qualification that it ought to be expunged from the records of the Senate because it is an offense to the Senate.'<sup>4</sup>

Two years later, President Coolidge's order permitting the appointment of any state, county, or municipal officer as a prohibition officer, although its legality was affirmed by the Attorney-General, was denounced on the floor of the Senate as 'a violation of the spirit and letter of the Constitution,' 'an imperial ukase and an act of tyranny.'<sup>5</sup> Without a dissenting vote the Senate adopted a resolution, directing the Committee on the Judiciary 'to inquire and advise the Senate as to whether the said order is within the legal powers of the Executive.'<sup>6</sup> The chairman of that committee had declared in Senate debate: 'I have no doubt in my own mind that the order is without warrant of law. The President had no more right to issue that order than I had.' But he later reported that the legality of the order was sustained by the majority of the committee.<sup>7</sup> Minority opinions were submitted by two members.<sup>8</sup> The House Committee on the Judiciary virtually placed its approval upon the executive order.<sup>9</sup> So ended the assault, launched with such violence against the President's order. But the immediate forecast was that it would probably not be put into effect, since its announcement had called forth antagonism so strong as to nullify its usefulness.

<sup>1</sup> S. Res. 357. Debated, amended and passed, July 16, 1912, *Cong. Rec.*, 9062, 9114-16; 9119-32. Not a Democrat voted against it; six Republicans voted for it.

<sup>2</sup> *Cong. Rec.*, 6087-88.

<sup>3</sup> T. J. Walsh, *ibid.*, 6106-09.

<sup>4</sup> J. A. Reed: 'It is a document that should never have been allowed to have the courtesy of a reception by this body. It is . . . an insult to the Senate itself. . . . The proper courtesies and decencies between the departments of the Government . . . in this instance have been grossly and offensively broken.' *Ibid.*, 6194-95.

<sup>5</sup> May 21, 1926.

<sup>6</sup> S. Res. 232, *Cong. Rec.*, 9885-86; 9982-97, May 25, 1926. One Senator declared that in his state the Governor 'would remove a state officer who became a deputy of the Federal Government.'

<sup>7</sup> Cummins, May 26. S. Rept. 1048.

<sup>8</sup> King and Caraway, June 9.

<sup>9</sup> June 10, 1926.

#### SENATE REQUESTS FOR EXECUTIVE ACTION

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The requests that are made and the inquiries that are instituted by Senate resolution may be grounded upon motives as varied as those which underlie 'questions' propounded to the Government in the House of Commons. Thus, while the Conference at Versailles was in progress a resolution was introduced in the Senate calling upon the President to request the American Peace Commission there to endeavor to secure for three designated Irish leaders 'a hearing before the Peace Conference in order that they may present the cause of Ireland.' No Senator can have expected that President Wilson would there take action which would 'queer the relations of this country with the most friendly nation of the world.'<sup>1</sup> But, without the slightest responsibility, the Senate could make this gesture of sympathy, which would be sure to embarrass the President, delight thousands of Anglophobes, and win Irish supporters for many a Senator. So the resolution was passed with but a single vote in the negative — that of John Sharp Williams, who had the independence to declare: 'I consider it ill-advised and none of our business.'<sup>2</sup>

In 1926, the long continuance of the strike in the Pennsylvania anthracite field led to many proposals. A resolution requesting the President to invite to the White House the representatives of both parties to the controversy, that he 'may urge upon them the national importance of an immediate settlement of the anthracite coal strike,' was derided as 'a bread pill,' a 'wholly fruitless thing.' Yet men who had opposed it finally voted for it, after emasculating it by amendments, in order that it might no longer obstruct Senate business.<sup>3</sup>

<sup>1</sup> W. E. Dodd, *Woodrow Wilson and His Work*, 324.

<sup>2</sup> June 6, 1919, *Cong. Rec.*, 729 ff. Viscount Grey commented upon another Senate resolution: 'We are not favorably impressed by the action of the Senate in having passed a resolution about Irish prisoners, though they have taken no notice of outrages in Belgium and massacres of Armenians.... The natural question on the action of the Senators is, "Why, if humanity is their motive, do they ignore the real outrages in Belgium?"' *Intimate Papers of Colonel House*, II, 317-18.

<sup>3</sup> Feb. 9, 1926, *Cong. Rec.*, 3586-89. Passed, 55 to 21. It had been modified by inserting 'at such time as he thinks best.'

The President promptly gave it to be understood that he considered the resolution in no respect binding upon the Executive, nor its passage evidence of the desirability of a change from the policy of non-intervention. Yet by its author's constituents this resolution — passed, in fact, mainly to save time which was being consumed in roll-calls — was doubtless 'accounted to him for righteousness.'

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#### EX-PRESIDENTS AS SENATORS

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To many of its members the Senate seems an admirable training-school for the Presidency. Might the White House afford a yet more valuable apprenticeship for service in the Senate Chamber? The question suggests interesting possibilities. After having served as Minister to Russia, as Senator, as Secretary of State, and as President of the United States, John Quincy Adams accepted nomination and was elected to the National House of Representatives, where seventeen years of service marked the climax of the distinguished career of the 'Old Man Eloquent.'

It is a singular coincidence that the only ex-President who ever sought and gained election to the Senate was the very man who had suffered most humiliation at its hands. Andrew Johnson entered the Senate in 1857. Five years later he resigned to accept President Lincoln's appointment as 'War Governor' of Tennessee. His energy and loyalty in that office led to his being made Vice-President of the United States, and a few weeks after his inauguration the death of Lincoln brought him to the Presidency. Antagonism soon developed between him and Congress. In the impeachment proceedings extreme rancor was shown, not only by the House Managers, but by the senatorial 'judges,' and his conviction failed by only a single vote.<sup>1</sup> In the summer which followed the ending of his tempestuous term as President, he stumped Tennessee for re-election to the Senate, but was defeated by a close vote in the legislature. Again he met defeat in 1872 in the race for election as Congressman-at-Large, but two years later he made a wonderful campaign, and on the fifty-fifth ballot in the

<sup>1</sup> Pages 856 and 878.

legislature he was elected to the Senate. In a speech to his admirers he declared that he should go to the Senate with no personal hostility to anyone, but with an affection for, and devotion to, the ancient landmark. It was a dramatic scene when on the fifth of March, 1875, the ex-President was seen slowly entering the Chamber. Edmunds ceased speaking. Embarrassment fell upon many. The Vice-President and one or two Senators respectfully stood. The Clerk proceeded to call the roll of newly elected Senators. 'Andrew Johnson,' he called. 'Present,' came the response. His Tennessee colleague and McCreary of Kentucky came down the aisle and escorted him to the Clerk's desk. The Vice-President, rising contrary to custom, administered the oath, and the man whom Morton had denounced within those walls as a 'violator of the Constitution and a violator of his oath,' and whom Sumner had characterized as 'the successor of Jefferson Davis in the presidential chair,' was again a Senator of the United States. Tears filled his eyes. 'I miss my old friends,' he said to the Senator by his side. 'All are gone, all but yourself, Senator McCreary.' With these words, he walked slowly to his desk, which was covered with flowers.<sup>1</sup> March 22, he made a speech of some power in opposition to a resolution approving President Grant's action in protecting Governor Kellogg of Louisiana.<sup>2</sup> Two days later the Senate adjourned. Before it convened in its first regular session in December, Johnson had died.

Two recent Presidents have considered with some seriousness the possibility of a senatorial career after leaving the White House.

From the Executive Mansion at Albany, Governor Roosevelt had written to his most trusted political and literary adviser, Henry Cabot Lodge (February 9, 1900):

Of course, I should jump at the Senate, if there was a possibility of getting there. I think that a Senator occupies on the whole the most useful and honorable position to be found in any civilized government, and I should never think twice about the money in such a position as that. But of course Senator Platt will be a candidate for re-election, and equally of course I shall support him. So the Senatorship is out of the question.<sup>3</sup>

Seven years later, with twenty months of his term as President still before him, Roosevelt is said to have told Taft that, if neither the office of President nor of Chief Justice should come to him, he wished

<sup>1</sup> R. W. Winston, *Andrew Johnson, Plebeian and Patriot*, especially chapter IX, 'The Comeback'; *Harper's Weekly*, XLVIII, 1856.

<sup>2</sup> *Cong. Rec.*, 121-27.

<sup>3</sup> *Correspondence of Theodore Roosevelt and Henry Cabot Lodge*, I, 450. Quoted with the permission of the Guaranty Trust Company of New York, the Roosevelt trustee.

that they might be colleagues in the Senate. The rumor was at that time current that President Roosevelt was giving thought to succeeding Platt in 1909.

Roosevelt's classmate and intimate friend, Congressman Charles G. Washburn, called upon the President only a few months before he was to leave the White House. His plans for the future were discussed. As Washburn recalled the episode, the conversation ended thus:

'Do not let any friend persuade or any enemy coerce you into becoming a candidate for office.'

'Do you mean the Senatorship?' said he — for he had been considered for Platt's place. 'I had not thought of that at present.'

'I mean any political office,' said I.<sup>1</sup>

Only a few months before the death of Woodrow Wilson, a personal and political friend broached to him the proposal that he stand for election to the Senate from New Jersey. The idea seemed to strike him favorably, and he authorized this friend to go to New York and canvass the ground with two of his (Wilson's) political advisers. Yet he frankly declared the Senate an inadequate arena in which to exercise his leadership:

From messages I get I realize that I am everywhere regarded as the foremost leader of the liberal thought of the world, and the hopes and aspirations of that liberal thought should find some better place of expression than in the Senate. There is only one place, you know, where I could be sure of effectively asserting that leadership. Outside of the United States the Senate does not amount to a damn. And inside the United States the Senate is mostly despised; they haven't had a thought down there in fifty years.<sup>2</sup>

In the cases of ex-Presidents Roosevelt and Wilson the proposal that they consent to return to public life in the Senate never found its way into serious political discussion, and their attitude to such a proposal is known only by their comments to personal friends. But in 1929 a movement seemed to be making headway to try to induce ex-President Coolidge to allow his name to be put forward as a candidate for the Senate from Massachusetts. With characteristic frankness and detachment he discussed the matter over his own signature. As to the earlier precedents of ex-Presidents who have returned to Congress after having served in the White House, he remarked that they had both retired from public life under circumstances which might make

<sup>1</sup> George H. Haynes, *Charles G. Washburn*, 126.

<sup>2</sup> James Kerney, *The Political Education of Woodrow Wilson*, 467–69. The date of this conversation is given as Oct. 23, 1923.

them eager to secure vindication by election to Congress, whereas in his own case no such motive could have a place; — he had no wish to return to any public office. Furthermore, it was his belief that to many colleagues his presence in the Senate would not be agreeable, and that it would probably often be embarrassing to the Administration, since the presence of an ex-President in Congress — however co-operative his intention — could not fail to lead to uncomfortable complications. He was positive in his assertion that while a seat in the Senate was a position to be held in the highest regard, it was no proper place for him — ‘a former President who tries to mind his own business.’<sup>1</sup>

Service by ex-Presidents in the Senate deserves consideration from another standpoint than that of the individual ex-President’s ambition for further political activity of that nature. James Bryce laid stress upon this point:

Frequently he [an ex-President] is a man of sufficient ability and character to make the experience he has gained of value to the country, could it be retained in a place where he might turn it to account. They managed things better at Rome, gathering into their hands all the fame and experience, all the wisdom and skill, of those who had ruled and fought as consuls and praetors, at home and abroad.<sup>2</sup>

A distinguished American publicist, John Bigelow, advanced the proposal that our ex-Presidents be made *ex-officiis* life-members of the Senate, receiving a substantial annual compensation, perhaps \$25,000.<sup>3</sup> The most serious objections which he anticipated to his proposal were the increase in the Senate’s membership, and the unbalancing of the States’ ‘equal suffrage in the Senate.’<sup>4</sup> But in recent years the Presidency has proved a crushing burden, resulting in the grim certainty that the number of surviving ex-Presidents at any one time would make but a very small addition to the Senate’s membership; and, since the election of Senators has been given to the people, Senators have

<sup>1</sup> *Cosmopolitan* (May, 1930), 24 ff.

<sup>2</sup> *The American Commonwealth* (3d ed.), 84. Viscount Bryce might have cited England instead of ancient Rome as a country in which the valuable experience of many of its ablest men — a Bryce, a Morley, or a Snowden — is retained ‘in a place where they may turn it to account’ — the House of Lords.

<sup>3</sup> *What Should We Do for Our Ex-Presidents? and What Shall They Do for Us?* (1906). Somewhat similar proposals have actually been offered as amendments to the Constitution. E.g., H. J. Res. 402, Jan. 15, 1915. In 1929, Fess announced his intention to introduce a constitutional amendment.

<sup>4</sup> Question has been raised whether the ratification of an amendment to make ex-Presidents life-members of the Senate would not require unanimous consent of the states, under the final clause of Article V.

come to figure less in popular thought as 'ambassadors of sovereign States.' Of course an ex-President could hardly banish from his mind antagonisms that had developed while he was in the White House;<sup>1</sup> and it is more than likely that some Senators would seek notoriety by attempting to draw fire from so conspicuous a colleague as an ex-President.<sup>2</sup> But Bigelow believed that the advantages of his plan far outweighed these objections. An ex-President would bring to the Senate an intimacy of knowledge of the administrative implications of a given proposal, and a broad-visioned experience, particularly in regard to international relations, that should be of immense value in the Senate's handling of many of its most weighty and distinctive problems.<sup>3</sup>

#### THE PRESIDENT AND SENATORIAL ELECTIONS

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A President can exercise not a little influence in helping or hindering the election to the Senate of men who seem to him to deserve such reward or punishment. Intervention of this sort has often been urged upon Presidents. Polk declared that he could not with propriety take

<sup>1</sup> Kerney quotes Woodrow Wilson: 'You know and I know that I have a temper, and if I was [sic] to go to the Senate, I would get into a row with old Lodge, who no longer counts for anything!' *Op. cit.*, 469.

<sup>2</sup> At the time when the possibility of ex-President Coolidge's being nominated for the Senate was being discussed, Harrison on the floor of the Senate commented: 'He'd better not take that nomination in the Senate. He won't shine here with the same brilliancy as he did in the White House. . . . If he comes here, he will have to take a back seat.' *Cong. Rec.*, Dec. 10, 1929.

Soon after his defeat in the presidential campaign of 1928 ex-Governor Smith in facetious mood suggested that the runner-up in such a contest should automatically become a member-at-large of the Senate. The proposal raises amusing queries as to the results if Bryan (1897), Roosevelt (1913), or Hughes (1917) had thus entered the Senate. In Smith's own case it seems not improbable that his chances for the Presidency would have been bettered if he had chosen to run for the Senate in 1926, instead of standing aside for his friend, Wagner. He would then have had the advantage of a 'try-out' in the national ring, before coming to the championship contest.

<sup>3</sup> An ex-President among his senatorial colleagues could exercise the 'power to encourage and the power to warn,' upon which Bagehot laid such stress. How advantageous the presence of such specially experienced colleagues might be finds illustration in the attention commanded by Clay and Webster, when these ex-Secretaries of State returned to the Senate, and in more recent days by Root and Glass in Senate discussion of topics with which they had become intimately conversant in their Cabinet positions.

any part in a contest between two aspirants.<sup>1</sup> Garfield resisted strong pressure to intervene in several states.<sup>2</sup>

On the other hand, a President inclined to take seriously his position as head of his party shows no such hesitancy. While Governor-elect of New Jersey, Woodrow Wilson by speech and in the press vigorously championed the election of Martine in preference to a former Senator, declaring: 'I do not see how any true Democrat in the circumstances can doubt his duty.'<sup>3</sup> During his two terms in the White House Wilson repeatedly intervened in campaigns of individual Senators; in 1918 he urged Minnesota voters to re-elect a Republican rather than vote for the Democratic candidate; he persuaded Henry Ford as a Democrat to enter the contest for a Michigan seat; in an open letter he declared that he would consider the re-election of Vardaman, whom he denounced as 'thoroughly false and untrustworthy,' as a condemnation of the President's Administration by the people of Mississippi. Only a few weeks before the congressional elections of 1918 he issued an appeal, not to Democrats, but to his 'fellow countrymen,' urging them to return a Democratic majority to both the Senate and the House.<sup>4</sup> This action caused deep resentment, and the election resulted in the loss of Democratic control in both branches of Congress.

Within a few days after his own nomination for the Presidency, Harding was in conference with the secretary of the Republican Senatorial Campaign Committee, planning for the fight to retain control of the Senate through the fall elections.<sup>5</sup> In some of the doubtful states in 1926 Republican candidates were quite resentful that so little

<sup>1</sup> Polk, *Diary*, I, 112–15.

<sup>2</sup> T. C. Smith, *James Abram Garfield*, 1067.

<sup>3</sup> He based this judgment in part upon the fact that in the extra-legal primaries, although only one-fourth of the voters had expressed any choice, Martine had led. Statement of Dec. 23, 1910. Before the primaries he is reported to have said: 'Of course Martine is impossible!' In 1918, to a New Mexico inquirer he telegraphed: 'No one who wishes to sustain me [in the settlement of foreign relations] can intelligently vote for him [Fall].' After he had left the White House, he used his influence against the re-election of Walsh, on the ground that, although his election had been largely due to the votes of Massachusetts Republicans and Independents who favored joining the League of Nations, Walsh had been a most persistent opponent of that step.

<sup>4</sup> Franklin K. Lane (*Letters*, 297) commented: 'Nov. 1, 1918. Nothing was said of politics — although things are at a white heat over the President's appeal to the country to elect a Democratic Congress. He made a mistake. . . . My notion was, and I told him so at a meeting three or four weeks ago, that the country would give him a vote of confidence, because it wanted to strengthen him. But Burleson said that the party wanted a leader with *guts* — this was his word, and it was a challenge to his (the President's) virility, that was at once manifest. The country thinks that the President lowered himself by his letter, calling for a partisan victory at this time. . . . But he likes the idea of personal party leadership.'

<sup>5</sup> Press dispatch, June 23, 1920.

help was extended to them by Coolidge. In his own state, probably to the injury of his own political prospects, the President threw aside neutrality, and, in an open letter to the Chairman of the Republican State Committee, announced his intention to come to Massachusetts to vote for the re-election of Senator Butler, whom he most heartily praised. But the result showed that even an exceptionally strong presidential candidate for re-election cannot deliver his personal political 'following' to the friend whom he is most anxious to see returned to the Senate.<sup>1</sup>

While refusing to yield to heavy pressure to support individual candidates for the Senate, President Hoover early took steps — at risk of injury to his own political future — to secure a higher standard of party organization, especially in the South, with a view to raising the level of nominations both for political office and for appointments in the civil service.

In the senatorial campaigns of 1934 and 1936 President Roosevelt gave outspoken support to Senators seeking re-election as 'Republicans,' but who had campaigned for him and backed his 'New Deal' measures. The one exception was in the case of Cutting (New Mexico).<sup>2</sup>

As the time of the 1938 primaries approached, the President began to take a more active interest in their selections. The halting of his Court Reorganization Bill in the first session of the Seventy-Fifth Congress by a vote of 70 to 20 had been a keen disappointment,<sup>3</sup> and it was evident that in the coming session his Executive Department Reorganization Bill<sup>4</sup> would also encounter determined opposition

<sup>1</sup> Butler had been Chairman of the Republican National Committee and Coolidge's campaign manager, and became his recognized spokesman in the Senate Chamber. Letter of Oct. 21, 1926.

<sup>2</sup> Cutting defeated the Administration-supported Democrat, Chavez, who promptly contested Cutting's title on what were generally believed to be groundless charges. Upon Cutting's death in an aeroplane accident, Chavez was appointed to fill the vacancy till a Senator should be elected. When he presented himself to be sworn in, five Senators walked out of the Chamber, and frankly avowed that they had done so because of their unwillingness to be present at the taking of the oath by a man whose campaign for election and contest for the title had shown such unchivalrous treatment of a Senator of high character and distinguished service.

<sup>3</sup> Pages 1007-08.

<sup>4</sup> This bill had many excellent features. But some others aroused grave apprehension: (1) the substitution of a single Civil Service Administrator for the bi-partisan Civil Service Commission of three — the Administrator to be appointed for a term of fifteen years by the President, and responsible only to him; (2) the subjection to the President's unchecked control of many such quasi-legislative agencies as the TVA; (3) the removal of congressional control of the Executive purse, by making the audit retrospective instead of prospective as at present.

In the week before the taking of the vote on this bill in the Senate, some 75,000 tele-

within his own party. Those who had been most insistent sponsors for these two measures now sought to persuade him to 'purge' the Senate of Democrats whose loyalty to the New Deal was uncertain by using pressure to prevent their renomination in the coming primaries. It was reported that some eight Senators were scheduled for 'elimination,' the 'acid test' being the stand that they had taken in opposition to those two Reorganization Bills. From the White House to Democratic leaders in Florida went the intimation that 'we' approve of Pepper's nomination. Postmaster Farley clarified Pennsylvania faction leaders as to the Administration's preferences. From the steps of the White House the Governor of Indiana announced that Van Nuys would not receive support for renomination. Iowa voters learned from James Roosevelt and Harry Hopkins, chief dispenser of billions of dollars of relief expenditures, of their keen interest in the campaign of an Iowa Congressman, who had been encouraged to contest the renomination of Senator Gillette. But in both Indiana and Iowa federal intervention in local primaries was resented, and both Senators were renominated.

After the defeat of the Executive Reorganization Bill, in a fireside chat the President discussed his rights and duties as head of the Democratic Party, and announced his intention to express his views during the campaign as to the candidates whose record of 'liberalism' (as interpreted by him) seemed most deserving of nomination for the Senate. A few days later he started on a trip to the Pacific Coast. *En route* he made many speeches in states where senatorial primaries were soon to be held. The enterprise soon lost the character of a drastic 'purge.' In only one state did he appear as the avowed advocate of a named candidate: in Kentucky he urged the nomination of the experienced Barkley, for whom his own personal intervention had secured election as majority leader in the Senate. In California, after some days of silence, he commended the renomination of McAdoo. In the other states he merely dispensed smiles and compliments among those whom he discriminately mentioned as 'My dear friend,' 'My friend of many years,' or 'My dear old friend,' and gave 'silent treatment' to other Senators, who might be standing on the train-end with him, but whose 'liberalism' was not up to his standard.

grams of protest came to Senators' desks. The bill was dragooned through the Senate by a vote of 49 to 42, a vote which the President declared had 'proved that the Senate cannot be purchased by organized telegrams.' One of his secretaries queried the use of the word 'purchased,' but the President said he had used it intentionally, and that it should stand. A few days later, the bill in the House was defeated by a vote of 204 to 196!

The Idaho primary brought defeat to a Senator seeking renomination on the simple platform of his '100-per cent New Deal Record,' attested by a formal statement given to the press by the Chairman of the Democratic National Committee (Postmaster-General Farley) that Pope had been unexcelled in his usefulness to the Administration. This unexpected reverse was followed by a strong revival of the 'purge' spirit in the campaign. In his first speech in Georgia the President made an opportunity to express his hope that United States Attorney Lawrence Camp would be Georgia's 'new Senator in the next Congress.' The next day, protesting his warm personal friendship for Senator George then sitting upon the platform, he proceeded to declare that George 'cannot possibly in my judgment be classified as belonging to the liberal school of thought.' He implied that he was a 'dyed-in-the-wool conservative,' who 'does not really in his heart believe in the broad objectives of the party and of the Government as they are constituted today.' 'On most public questions he and I do not speak the same language.' Not less emphatic than his condemnation of George's candidacy was his emphasis upon Camp's qualifications, ending: 'I have no hesitation in saying that if I were able to vote in the September primary in this state, I most assuredly would cast my ballot for Lawrence Camp.'<sup>1</sup>

At the end of this speech, Senator George came to the desk, shook the speaker's hand, and exclaimed: 'Mr. President, I regret that you have taken this occasion to question my Democracy and to attack my public record. I want you to know that I accept the challenge.'

He forthwith went before his Georgia constituents with the questions:

Are the people, of Georgia, as a sovereign state, entitled to and capable of choosing their own servant?

Don't you want to vote for whomever you please? And when you have

<sup>1</sup> President Roosevelt's attitude and action here are to be compared with those of President Washington. To Col. John Francis Mercer, who without the slightest warrant had been claiming that the President had warmly urged his re-election to Congress from his Maryland district, President Washington, Sept. 16, 1792, wrote in stern protest: There has been 'the most scrupulous and pointed caution on my part, not to express a sentiment respecting the fitness of any candidate for representation that could be construed, by the most violent torture of words, into an interference in favor of one or to the prejudice of another.'

I have conceived 'that the exercise of an influence, however remote, would be improper; as the people ought to be entirely at liberty to choose whom they pleased, to represent them in Congress.'

'The rule I have prescribed to myself, and which I had invariably observed (is that of) not interfering directly or indirectly with the suffrages of the people, in the choice of their representatives.'

elected the man that you wish to represent you, don't you want him to exercise an independent, conscientious, God-fearing judgment on all matters of great importance.

He declared that nearly all of the great measures that were intended to advance the welfare and well-being of his people had had his wholehearted support, and explained frankly the reasons why in a few instances he had voted against measures upon which the President had been insistent. He took pains to make it perfectly plain that if he should go back to the Senate he would not vote to pack the Supreme Court; he would not vote to abolish the Civil Service Commission and put over the 700,000 federal employees one man, appointed by the President; and he would not vote for the anti-lynching bill, nor for 'any other bill that I know is unconstitutional by any fair test.'

In South Carolina Senator E. D. Smith, who had been an opponent of several of the President's measures, was a candidate for a fifth term in the Senate. Three days before the primary, the President issued a statement, in which he strongly urged the nomination of the young and 'liberal' Governor Johnston, the only other candidate, in place of the veteran Senator. Smith made a vigorous campaign, protesting against a President's presuming to select a Senator for South Carolina, and asserting the right and duty of a Senator in Congress to vote on men and measures according to the dictates of his own conscience and judgment as to the best interests of South Carolina and not at the behest of the President or any other 'outsider.' In the primary he won the nomination by a vote of more than three to one.

Upon his return to the Capital, President Roosevelt extended his 'purge' to include Senator Tydings of Maryland, and Congressman O'Connor of New York, chairman of the House Committee on Rules. Both men, he declared, 'after giving the New Deal lip service in 1936, turned around and knifed it in Congress in 1937 and 1938.'

Like Senator George, both of these men boldly accepted the challenge. They asserted their responsibility, not to the President, but to the constituencies that had elected them, and their right and duty to exercise their best judgment upon the measures submitted to them.<sup>1</sup>

<sup>1</sup> Current history records that the first step of the dictator is to abolish, or make impotent, the legislative branch of the government. That step is indispensable to the fulfillment of his program and the attainment of his "100 per cent."

'What the American people are seriously concerned about at this very moment is this demand of the President for only "yes-men" in our parliament. They are asking

At this writing, the elections of 1938 are ten weeks in the future. It would be futile and entirely out of place to venture here a wild forecast as to how these unprecedented electioneering activities of President Roosevelt will affect the personnel of the group of thirty-two Senators who are to begin new terms of service in the Seventy-Sixth Congress, or the line-up in the presidential election of 1940. But in ending this book's survey of a century and a half of the history of the Senate of the United States this comment may not be untimely: In the election of November 8, 1938, for the first time in our history each individual voter who casts a ballot for Senator will have had every opportunity to learn which of the several candidates bears the President's personal stamp of approval. And he may be sure that that approval has been given only to those who by past record or by pledge for the future have thoroughly committed themselves to stand for a prodigious increase in the powers of the Executive and a corresponding lessening of the influence of the courts and of the legislative branch of the Government. That day's election may bode a revolutionary shift in the balance of the American System.

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‘A COUNSEL OF PERFECTION’

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The relations between the President and the Senate have probably nowhere been more discerningly discussed than in a book by Woodrow Wilson, published five years before he became President. His comments are of the greater interest in that they reveal his thought at that time as to the ‘right accommodation’ between President and Senate ‘which will give the Government its best force and synthesis,’ and in that they recall the difficulties, originating not less in himself than in the Senate, which he encountered in trying to translate the ideal into the real.

each other: “Well, what is the difference between that and having no legislative branch of the government at all?”

‘Does it not, either way, lead inevitably to the same end — one-man government?’  
Congressman John J. O’Connor, August 18, 1938.

‘I will never consent to be a rubber stamp or a ventriloquist’s dummy.’  
Senator Millard E. Tydings.

The formality and stiffness, the attitude as if of rivalry and mutual distrust, which have marked the dealings of the President with the Senate, have shown a tendency to increase rather than to decrease as the years have gone by, and have undoubtedly at times very seriously embarrassed the action of the Government in many difficult and important matters.

The Senate has shown itself particularly stiff and jealous in insisting upon exercising an independent judgment upon foreign affairs....

But there is another course which the President may follow, and which one or two Presidents of unusual political sagacity have followed, with the satisfactory results that were to have been expected. He may himself be less stiff and offish, may himself act in the true spirit of the Constitution and establish intimate relations of confidence with the Senate on his own initiative, not carrying his plans to completion and then laying them in final form before the Senate to be accepted or rejected, but keeping himself in confidential communication with the leaders of the Senate while his plans are in course, when their advice will be of service to him and his information of the greatest service to them, in order that there may be veritable counsel and a real accommodation of views instead of a final challenge and contest....

No one can play the leading part in such a matter with more influence or propriety than the President. If he have character, modesty, devotion, and insight as well as force, he can bring the contending elements of the system together into a great and efficient body of common counsel.<sup>1</sup>

<sup>1</sup> *Constitutional Government in the United States* (1911), 138-40.

Grover Cleveland deplored the 'stiffness and offishness' in the relations between President and Senate no less than did Woodrow Wilson; but he, too, found it impossible to 'bring the contending elements of the system together.' To Thomas F. Bayard, Feb. 13, 1895, he wrote:

Think of it! Not a man in the Senate with whom I can be on terms of absolute confidence.... Not one of them comes to me on public business unless sent for, and then full of reservations and doubt. We are very far apart in feeling and, it seems to me, in purposes.



# XIX

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THE SENATE AND THE HOUSE OF REPRESENTATIVES:  
CONTACTS AND CONTRASTS

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Most of the leading figures among the active public men of the country are now to be found in the Senate, not in the House. . . . Organization swallows men up. Debate individualizes them, and men of strong character and active minds always prefer the positions in which they will be freest to speak and to act for themselves.

WOODROW WILSON (1908)

The boasted deliberation of the Senate has been purchased at the cost of efficiency, while the House, by becoming undeliberative, has suffered from too much efficiency. The House cannot consider, but can act.

CHESTER H. ROWELL

Loquacious obstruction is less injurious to the public interest than silent obedience.

HENRY LOOMIS NELSON



# XIX

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## THE SENATE AND THE HOUSE OF REPRESENTATIVES: CONTACTS AND CONTRASTS

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### RELATIVE PRESTIGE AND POWER OF SENATE AND HOUSE

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IN THE evolution of American Government few changes have been more in contrast with the anticipation of the framers of the Constitution than the development in relative power and prestige of the House and of the Senate. To the Senate it was the intent to give a salutary revisory or corrective power over legislation, and certain executive powers similar to those which had been exercised by the British House of Lords or the Privy Council; or by the Council in association with the Colonial Governor. But in the early days of the Convention Madison declared:

I am fully of the opinion that the numerous and immediate representatives of the people composing the House will decidedly predominate in the Government.<sup>1</sup>

And Hamilton wrote:

The most popular branch of every government, by being generally the favorite of the people, will be generally a full match, if not an overmatch, for every other member of the Government.

### PERIOD I: 1789-1820

During the first thirty years of the Senate's existence for the most part this forecast was fulfilled. Although the first law enacted by Congress — that prescribing the oaths to be taken by certain officers

<sup>1</sup> Letter to Edmund Pendleton, June 21, 1787.

— originated in the Senate, in the controversy which at once arose over the forms and ceremonies to be associated with the Presidency the Senate's aristocratic proposals were overborne by the House, not without ridicule. Although from the beginning the Senate initiated more important legislation than is generally recognized,<sup>1</sup> yet on such an important measure as that relating to the power of removal, in which the Senate's own power was in question, the vital debate took place in the House. Maclay repeatedly referred to the dull and trivial proceedings in the Senate Chamber, and to early adjournments in order that its members might have an opportunity to listen to the more spirited debates in the House.<sup>2</sup> The Senate was but a 'private conference of notables,' meeting till 1794 behind closed doors. Its debates were not reported in the press, and its proceedings could attract little public attention. Madison declared that, 'being a young man and desirous of increasing his reputation as a statesman, he could not afford to accept a seat in the Senate.'<sup>3</sup> In 1810, after some months of service in the Senate on appointment to fill a vacancy, Henry Clay declined to be a candidate for election to that body, preferring to accept a nomination for the House, 'influenced by a partiality for the station,'<sup>4</sup> where he saw the larger opportunity. The great debates on the issues which led to the War of 1812 took place in the House.

The light esteem in which a seat in the Senate was regarded was indicated by the willingness with which many a Senator surrendered it, not only to take a seat in the House, but to become governor of a state — like Hayne, in 1833, despite the prestige which he had just won in his debate with Webster — or even to become mayor of a city.<sup>5</sup> Dignity rather than power characterized the Senate of this early stage. Joseph Story, giving his first impressions of Washington in 1808, wrote:

The Senate, generally, is composed of men of ripe years and respectable appearance. Yet I am assured . . . that in talents the House is greatly superior.<sup>6</sup>

<sup>1</sup> Page 75.

<sup>2</sup> His entry of April 3, 1790: 'Went to the Hall. The minutes were read. A message was received from the President of the United States. A report was handed to the Chair. We looked and laughed at each other for half an hour, and adjourned.'

<sup>3</sup> Quoted by W. B. Munro, *The Government of the United States*, 198. At another time Madison plainly intimated that the style of living expected of Senators was more expensive than he could afford.

<sup>4</sup> Clay, *Works*, IV, 47.

<sup>5</sup> In 1820, Webster declared that after service in the Senate men were frequently elected to the House. (*Works*, III, 12.) De Witt Clinton left the Senate for the mayoralty of New York in 1803, and H. G. Otis resigned in 1822 to become mayor of Boston.

<sup>6</sup> *Life and Letters of Joseph Story*, I, 158.

## PERIOD II: 1821-1861

Yet there were already signs that the balance would shift. The Senate had hardly been organized a month when Maclay recorded: 'The moment a party finds a measure lost or likely to be lost, all engines are set to work in the upper House.' This recognition of an unlimited power of revision and amendment, even in the case of 'money bills,' was the earnest of a practical Senate equality if not dominance in the business of lawmaking. The opening of the doors of the Senate Chamber and the publication of its debates brought the Senate within the focus of the people's attention. In the struggle over the Missouri Compromise the Senate showed far greater strength than in the debate of the war issues of the previous decade. The adoption of that Compromise, shutting slavery out from the section where population was growing most rapidly, made it clear that the cause of the states' rights must soon be lost, unless it could be successfully upheld in the Senate, where equality of state representation kept the contest in balance. In the period between the Missouri Compromise and the Civil War, therefore, the Senate became the forum to which states sent their ablest men to determine fundamental issues of morals and of the structure of the Government. Even the triumph of Jacksonian democracy served in some ways to exalt the Senate. Its adoption of 'rotation in office' tended to fill the House with new men. As tenure of Representatives became more uncertain, the long term of Senators and their independence as 'ambassadors of a state' rather than representatives of a mere district, made the Senate Chamber a welcome arena for the great parliamentary leaders, Webster, Clay, and Calhoun. 'The prestige of the Senate both at home and abroad was the creation of this period.'<sup>1</sup> Story, who in 1808 had declared the House in talents greatly superior to the Senate, in 1833 wrote of the Senate:

It has given a dignity, a solidity and an enlightened spirit to the operations of government which have maintained respect abroad and confidence at home.<sup>2</sup>

De Tocqueville, in 1834, contrasted the House and Senate, querying:

Why is the former body remarkable for its vulgarity and its poverty of talent, whilst the latter seems to enjoy a monopoly of intelligence and sound judgment?<sup>3</sup>

<sup>1</sup> H. J. Ford, *The Rise and Growth of American Politics*, 262.

<sup>2</sup> *Commentaries*, sec. 725.

<sup>3</sup> *Democracy in America*. Chapter VIII elaborates his praise of the Senate.

He found the only satisfactory answer in the indirect election of Senators. Benton criticized this judgment, declaring that the real causes for the greater prestige of the Senate were the smallness of that body, the long term, the Senators' greater age, their longer preliminary training in the state governments or in the House, and the fact that the Senate was composed of 'the pick of the House of Representatives, and thereby gains doubly — by brilliant accession to itself and abstraction from the other.'<sup>1</sup>

Important legislative projects were initiated in the Senate during this period. The Senate's power was also enhanced by the introduction of the 'spoils system,' for while the Senate did not at that time assert control over removals, its consent had to be secured for the horde of new appointments, and even Jackson often found himself balked by the Senate's refusal to sanction his filling forced vacancies with men pledged to do his will.<sup>2</sup>

From the beginning of Senate history its members' long tenure had been exercising an influence which now attained great weight. Newly elected Senators, coming to Washington for a term of at least six years, looked upon themselves not as mere transients, as Representatives tended to become. On the other hand, Senators gained stability; many of them established homes in Washington, and entered into the social life of the Capital. The intimacy within their own membership fostered the development of 'senatorial courtesy,' which might manifest itself in a friendly consideration toward colleagues or in a baffling *esprit de corps* in a contest with the President or with the other House.

In the twenty years before the Civil War the Senate was the dominant force in the Government, and 'the fate of the country was largely settled in the Senate.' It was there, not in the White House, that the true leaders were to be found. Webster, Clay and Calhoun, who had all been presidential aspirants, in ability and in weight of influence before the country far outranked Presidents Tyler, Fillmore, and Polk. In the next decade (1850 to 1860) men looked for leadership to Douglas, Seward, and Sumner rather than to such weak and inadequate

<sup>1</sup> *Thirty Years' View*, I, 205 ff. He mentions the two most noteworthy instances of men of high distinction, refused election to the Senate by the legislatures, who were sent by popular election to the House — J. Q. Adams and John Randolph. Though long a member of the Senate, Benton held that 'duty to itself [the House], to its highest functions, to the people, to the Constitution, and to the character of democratic government requires it to resume and maintain its controlling place in the machinery and working of our federal government.'

<sup>2</sup> Page 794 ff.

Presidents as Pierce and Buchanan.<sup>1</sup> Senators felt an intense pride in their office. Webster in 1830 characterized it thus:

This is a Senate of equals, of men of individual honor and personal character, and of absolute independence, who know no master and acknowledge no dictation.<sup>2</sup>

And Sumner declared:

A seat here is a lofty pulpit with a mighty sounding-board, and the whole widespread people are the congregation.<sup>3</sup>

Senators faced each other as ambassadors of their several states. Dignity and decorum in the main were maintained upon a higher plane than in the House. Debate became august, forensic, 'Websterian.'

#### PERIOD III: 1861-1899

From 1861 to 1865 war necessities — as always — enormously enhanced the power of the Executive as compared with that of Congress; but the Senate was more assertive and critical of the President, than was the House. In the following decade the Senate regained and increased its ascendancy in relation to the Presidency, as evidenced in the enactment and attempted enforcement of the Tenure of Office Act and in the Johnson impeachment trial.

From the end of the Civil War to the close of the century, the Senate was losing something of its distinctive quality and was becoming in some respects more like the House. The admission of eleven new states increased the Senate's numbers, to the distinct lessening of its fitness for the performance of its peculiar functions in relation to the making of treaties and appointments. A mere change in its physical environment had a marked effect upon its proceedings. On the eve of this period the Senate had moved from the historic scene of 'the great debates' into the cavernous new Chamber — its floor, like that of the Hall of the House, too large for effective speaking, and surrounded by enormous galleries, often thronged with distracting auditors. The change in the House rules and their administration, for which Speaker Reed was largely responsible, curbed obstruction and delay, and gave prompt effect to the will of the majority; but in so doing they put an end to genuine debate on the floor of the House, and left the Senate as

<sup>1</sup> This contrast between the Presidents and Senators of this period is strongly presented by Senator Lodge, *The Senate of the United States*, 16 ff.

<sup>2</sup> Webster, *Works*, III, 274.

<sup>3</sup> Sumner, *Works*, XIII, 191.

the only national deliberative body. Senate debate developed the 'defects of its qualities'; the freedom permitted by its rules was often abused till it became mere factious opposition or time-killing to a degree before unknown.

With the settlement of the questions of slavery, states' rights, and reconstruction, there followed a score of years in which the great issues were mainly economic. With this change there came to the Senate leaders with a new outlook and method. The typical Senate leader of the fifties — the oratorical, constitutional lawyer — gave place to the corporation lawyer and to the astute manager of party organizations and state legislatures. It was during the period of such leadership that 'encroachment' and 'usurpation' came to be charged against the Senate as never before. Critics pointed to Senators' shameless fights to control 'patronage,' to their rewriting revenue bills 'originated' in the House, and to their dominance in legislation on banking and currency, and on the regulation of railways and of trusts.

Senator Hoar in 1903 recorded his judgment that the Senate at the end of the period of Reconstruction was at the very height of its constitutional power — and 'a more powerful body than ever before or since.' He enumerated an impressive list of members who then upheld the dignity and authority of the senatorial office, and commented: 'If they visited the White House, it was to give, not to receive advice.'<sup>1</sup>

#### PERIOD IV: SINCE 1899

From the war with Spain the United States suddenly emerged as a world power. 'Imperialism' at once became the issue of the hour. The searching debates in the Senate relating to our new responsibilities overseas were the principal means of forming public opinion upon those subjects. As our foreign relations became more complicated in the first decade of the new century, the Senate's sole power as to consenting to the ratification of treaties and the consideration which matters of foreign policy received in the Senate, as compared with their hasty and partisan treatment in the House, tended strongly to enhance the public's appreciation of the Senate's power. In dealing with the prodigious issues raised by the World War and the Treaty of Versailles, the House seemed to the public at home and abroad to have relatively little influence. In the House the new member felt lost in the crowd. By the time he had gained some familiarity with its rules, he must begin worrying about re-election. In the Senate, on the

<sup>1</sup> G. F. Hoar, *Autobiography*, II, 46.

other hand, the new member felt himself an individual, with far wider scope for making his opinion count by speech and by vote.<sup>1</sup> Foremost House leaders showed eagerness to mount what Sumner called that 'lofty pulpit' with 'its mighty sounding-board.'

It is true that party discipline in the House gave to Reed and to Cannon so great a concentration of power that Senate autocrats like Aldrich and Hale had to parley and compromise with them. But when the Speakership was 'put in commission' by the revolution of 1910, 'czardom' came to an end. However, by changes in its own rules, especially as to its handling of Senate amendments to general appropriation bills, the House put a check upon one of the Senate's most usurpatory practices.<sup>2</sup> At a later day, by a reorganization of its committees and by better party organization, the House regained a considerable measure of its control over financial legislation. In closing a comprehensive review of the work of the House in the first session of the Sixty-Eighth Congress, Floor-Leader Longworth declared:

I think it can be fairly said, too, that the House of Representatives of the present Congress has proved itself to be — in so far, at least, as the fiscal affairs of the Government are concerned, as was intended by the framers of the Constitution — the dominant branch of the Government.<sup>3</sup>

In recent years, democracy has been taking on new forms and methods. The first decade of the twentieth century saw the rapid spread of the initiative, the referendum, and the direct primary. These reinforced the demand for the transfer of the election of Senators from the choice by state legislatures to election by direct vote of the people, which culminated in the adoption of the Seventeenth Amendment.<sup>4</sup> The champions of this change predicted that it would effect revolutionary reform in the personnel of the Senate.<sup>5</sup> No such startling effect is apparent. Popular election's most obvious result seems to have been the effacing of differences which formerly distinguished the personnel of the Senate from that of the House. Like Representatives, Senators are now elected by direct vote of the people. They come from constituencies larger than the congressional districts, but distinct neither in quality nor in method of action. To

<sup>1</sup> 'Today the most powerful factor in making the Senate stronger than the House rests on the difference between the rules and practices of the two bodies. A more striking instance of the effect of mere machinery on governmental institutions would be hard to find. In one branch this machinery elevates the individual; in the other it subordinates him. Any Senator may freely exert his full strength; only the exceptional Representative can do his best.' Robert Luce, *Legislative Procedure*, 427.

<sup>2</sup> House Rule XX, sec. 2 (1920). Page 358.

<sup>3</sup> June 5, 1924, *Cong. Rec.*, 10910.

<sup>4</sup> Pages 96–116.

<sup>5</sup> Page 1041.

those larger constituencies Senators, like Representatives, must cater, though at far greater outlay of energy and money.

The Senate is still the dominant branch of Congress. Since the opening of the new century, in general its power as compared with that of the House has not suffered decline. In some respects it has distinctly increased. There seems to be a tendency to settle by treaty or convention, to which the Senate is a party, matters relating to our economic foreign relations such as formerly to a greater extent were determined by Acts of Congress originating in the House. But while in this period the Senate has maintained and even increased its power, it has by no means advanced in prestige at home or abroad.

#### REPRESENTATION IN SENATE AND HOUSE

To the Federal Convention came delegates from the small states determined — in the case of Delaware, imperatively instructed by the legislature — to accept no plan for the National Legislature that did not retain an ‘equal voice’ for each state. Their fear that the small states would be overborne in a legislature based upon population was matched by the anxiety of large-state delegates that a continuance of the ‘small states’ negative,’ as it had been experienced in the Congress of the Confederation, would ‘fleece the large and wealthy states.’ After much anxious debate and negotiation, the ‘Great Compromise’ assigned ‘equal suffrage’ to each state in the Senate and representation according to population in the House. The concession to the small states was doubly clinched by the delegates’ eleventh-hour provision: ‘No state, without its consent, shall be deprived of its equal suffrage in the Senate.’

No delegate in that Convention could have imagined the astonishing inequality to which that ‘equal suffrage’ has already given rise — an inequality which is rapidly increasing.<sup>1</sup> In the Census of 1790 the

<sup>1</sup> State	Apportionment 1789	Population 1790	Apportionment 1929	Population 1930	Apportionment 1930
New Hampshire.....	3	141,885	2	465,293	2
Massachusetts.....	8	378,787	16	4,249,614	15
Rhode Island.....	1	68,825	3	687,497	2
Connecticut.....	5	237,946	5	1,606,903	6
New Jersey.....	4	184,139	12	4,041,334	14
New York.....	6	340,120	43	12,588,066	45
Pennsylvania.....	8	434,373	36	9,631,350	34
Delaware.....	1	59,096	1	238,380	1
Maryland.....	6	319,128	6	1,631,526	6
Virginia.....	10	747,610	10	2,421,851	10
North Carolina.....	5	393,751	10	3,170,276	11
South Carolina.....	5	240,073	7	1,738,765	6
Georgia.....	3	82,548	12	2,908,506	10

ratio of the largest to the smallest state — Virginia to Delaware — was less than 13 to 1. In the Census of 1930 the ratio is more than 138 to 1 — New York to Nevada.

As a matter of fact, representation of states in the House is far from approximating proportionality to population. Though Nevada has but one Representative, she secures that representation for a population less than a fourth as large as that of many districts in other states.<sup>1</sup> Furthermore, in the interim between reapportionments the lag of disproportionate representation may be very great.<sup>2</sup>

In the Convention itself, and in the ratifying conventions, it was a moot question whether danger would not develop from the clash of interests between the large and small states.<sup>3</sup> Hamilton argued that there was no danger of hostile combinations.

The more close the Union of the states, and the more complete the authority of the whole: the less opportunity will be allowed the stronger states to injure the weaker.

Fifty years later, de Tocqueville commented thus:

If the minority of the nation preponderates in the Senate, it may paralyze the decisions of the majority represented in the other House, which is contrary to the spirit of constitutional government.... All the states are young and contiguous; their customs, their ideas, and their wants are not dissimilar; and the differences which result from their size or inferiority are not sufficient to set their interests at variance. The small states have consequently never been induced to league themselves together in the Senate to oppose the designs of the larger ones.<sup>4</sup>

Although in later years the equal suffrage in the Senate often became a subject of popular criticism, a century had passed before an attempt was made by factual study to determine 'whether the line of division between the large and small states can be traced and whether the system of representation in the Senate has had the practi-

<sup>1</sup> By the Census of 1930 each of four congressional districts in Pennsylvania was found to have a population of over 400,000. Besides Nevada, each of the following states has but a single Representative; Arizona, 435,573; Delaware, 238,380; New Mexico, 423,317; Vermont, 359,611; Wyoming, 225,565.

<sup>2</sup> In the reapportionment following the Census of 1930, such changes in the size of state delegations in the House were made as these: Increases: California, 11 to 20; Michigan, 13 to 17; Texas, 18 to 21; Decrease, Missouri, 16 to 13. Such gross inequalities had developed and persisted because — in flagrant violation of the plain intent of the Constitution — no reapportionment had been made based upon the Census of 1920. Such bills, twice passed by the House, in 1921 and 1929, were killed in the Senate.

<sup>3</sup> Madison, *Debates*, 131.

<sup>4</sup> *Democracy in America* (1839 ed.), 11.

cal effect of putting that body under the control of popular minorities.'<sup>1</sup> In seeking to answer these questions, Mr. S. E. Moffett analyzed Senate votes on twenty-two of the most important and decisive issues from 1789 to 1893. He found no trace of combinations of small *versus* large states, and that in all the cases cited 'there has probably been only one instance in which the average population of the states ranged on one side has been as much as twice that of the states ranged on the other. In most cases the balance has been quite as even as it would have been with congressional districts. In every case the small states have been divided.' A sectional or an economic interest seemed to him to have more to do with the states' line-up than mere 'smallness,' and he reached the complacent conclusion: 'Under a comprehensive view all minor inequalities are absorbed in a wider justice.'

A more critical analysis has led a later investigator to the belief that on the average in those twenty-two cases the divergence of the population per vote on one side from that on the other was nearly forty per cent, and he commented: 'It is merely playing upon words to assert that such inequalities of representation are "absorbed in a wider justice."'<sup>2</sup> Turning to the Congresses of the period 1875 to 1925, as a result of careful research he reached the conclusion that in four of them the party majority in the Senate represented a minority of the population, with the result that a considerable percentage of its yea-and-nay votes and a large percentage of all close votes might be considered 'unrepresentative'; in the three sessions of the Sixty-Eighth Congress, one-eighth of all yea-and-nay votes in the Senate and more than one-third of all close votes were carried by representatives of a minority of the population.

'Pairs,' as used in the Senate, make its voting still more illogical and unrepresentative. Although a general pair may exist and be adhered to, it is not necessarily announced. Even if it is announced, the states whose votes are thus squared off against each other by private or personal agreement may be of very different population 'weights.' For example, in the Sixty-Fifth Congress on forty-two of the fifty-two record votes Fall of New Mexico, a one-Representative state, was paired with Senators on the average representing states seven times as populous; in the same Congress, Wadsworth from New York, a forty-

<sup>1</sup> S. E. Moffett, 'Is the Senate Unfairly Constituted?' *Political Science Quarterly* (1895), 248-56.

<sup>2</sup> Carroll H. Woody, 'Is the Senate Unrepresentative?' *Political Science Quarterly* (1926), 219-39.

three-Representative state, was paired eighteen times with Senators represented on the average by less than three Representatives.<sup>1</sup>

Especial significance attaches to Professor Wooddy's studies — in contrast with the Moffett analysis which extended only to 1893 — because they cover the first quarter of the twentieth century, a period in which legislation became less concerned with constitutional problems and more with economic and social questions. In dealing with such matters the states' 'equal suffrage' in the Senate gives a heavy weighting to a new grouping of states — the new Western States which are 'insignificant in the popular, but powerful in the territorial body.'<sup>2</sup> Delaware and Rhode Island have always been fated to remain small because pent in by narrow bounds; but their interests, economic and social, ally them with their populous and wealthy industrialized neighbors. On the other hand, most of the other states which have but one or two Representatives remain 'small' in the House because, although in area they may be among the largest members of the Union, their natural resources are so scanty that as yet they have made slow growth.<sup>3</sup> In recent years economic changes have brought agriculture into evil plight, and the sparsely settled states, mainly dependent upon the growing of staple crops or mining, have found in the Senate their opportunity to make common cause in seeking 'relief' from the Federal Government, however out of accord some of their programs may have been with their own permanent advantage, with the interests of the country at large, or with world-wide economic trends.<sup>4</sup>

<sup>1</sup> C. H. Wooddy, *op. cit.*, 228–30.

<sup>2</sup> L. G. McConachie, *Congressional Committees*, 252.

States	Area (sq. m.)	Population 1930	Density per (sq. m.)	1933 Federal Income Tax
New York.....	47,654	12,588,066	264.2	\$240,001,789
Pennsylvania.....	44,832	9,631,350	214.8	65,354,916
Massachusetts.....	8,039	4,249,614	528.6	35,169,560
Nevada.....	109,821	91,058	0.8	1,522,931
Wyoming.....	97,594	225,565	2.3	334,572
Montana.....	145,776	537,606	3.7	636,456
United States.....		122,775,046		

<sup>4</sup> For example: In 1929, the Senate attached to the Farm Relief Bill what was known as the 'debenture plan,' providing for export bounties on staple farm products. It was estimated that this amendment would cost the Treasury \$150,000,000 annually. Of the 37 states whose individual senatorial delegations were not split in opinion, 19 voted for the debenture plan and 18 against it. But the 19 states comprised a population of 37,000,000 as compared with the 18 states' 44,000,000; and of the total income taxes

Pessimists assume that the Constitution bars reform by its provision that no state, without its own consent, shall be deprived of its 'equal suffrage in the Senate.' Yet history records no constitutional barriers that have proved actually insuperable. The 'Articles of Confederation and Perpetual Union' were declared to be unalterable, unless such change be 'confirmed by the legislatures of every state.' Yet within eight years by 'the bloodless revolution' the Articles were entirely set aside by the ratification of the Constitution at the hands of conventions in nine states. The real obstacle to change in senatorial representation is to be found, not in the explicit pledge that there shall be no deprivation of the 'equal suffrage' without each state's consent, but in the great power which may be exercised by a small minority of the states — in this case, the states of least population — to block either the proposal or the ratification of an amendment.<sup>1</sup>

Each decennial census shows the trend of United States population from rural to urban. In the House this trend is reflected in each reapportionment, allotting additional members to the more rapidly growing states, or it may be — as in 1930 — cutting down the representation of states of slower growth.<sup>2</sup> In the Senate, on the other hand,

paid by all the 37 states in question only 25 per cent came from the 19 states which favored this legislation, while 75 per cent came from the 18 states opposed. Robert Luce, *Legislative Principles*, 368–69.

In view of the growing tendency of the smaller and poorer states to attempt by combined action in the Senate to secure such benefits at the expense of the larger and wealthier states, James M. Beck bewailed as 'fatal mistakes' the Constitution's grant of 'equal suffrage in the Senate' to all states and the ratification of the 'Income Tax Amendment,' and seriously raised the question, 'Can the Union Survive?'

Are the states of small population now getting 'representation without taxation'? See Charles E. Merriam, *The Written Constitution and the Unwritten Attitude*, 60.

<sup>1</sup> In Congress a resolution proposing an amendment of the Constitution, e.g., to change the states' representation in the Senate — could be blocked by the vote of small-state Senators representing an aggregate population of less than 10,000,000, as against the votes of states with a population of nearly 113,000,000. If by any chance the proposed amendment were sent to the states for ratification, it could be defeated by the votes of states with a population of less than 6,000,000 against the will of the other 117,000,000.

<sup>2</sup> C. E. Merriam, *Recent Social Trends* (1933 ed.), ch. 29, 'Government and Society.' See its Table I, 'Population Trends from Rural to Urban and Their Effect upon the Control of Congress' (1900–1930), 1492. Mr. V. O. Key, Jr., has kindly broken down that table's figures for 'Control of Congress' so that the effect of these population trends in the Senate and in the House is shown separately in table on page 1011.

These figures indicating the 'urban trend' of population are less startling when it is recalled that a state is here classified as 'urban' if a majority of its inhabitants live in towns or cities of 2500 or over. In 1920, 82.7 per cent of New York's population was 'urban,' and by 1930 that percentage had risen to 83.6. On the other hand, in that decade Nevada's urban population had risen from 19.7 to 37.8 per cent. But almost exactly one half of the state's increase in population had been in the one city of Reno. If during that decade there had been no immigration from outside into Nevada, and the state's population had not increased by a single soul, but if 27,100 of Nevada's rural pop-

each state's 'equal suffrage' remains unchanged, although the attitude of a state's Senators may be modified as the state's population becomes more urbanized. The obvious tendency is for the clash of interest between the large industrial and commercial states, proportionately represented in the House, and the small agricultural and mining states, overrepresented in the Senate, to become intensified in the future.

The question whether the future 'Senate of the United States' could not and should not be made more 'representative' has been given serious consideration from the standpoint of the political scientist and also from that of the practical politician. Professor Charles E. Merriam's study of present trends has led him to conclude:

1. That it is necessary to face in the near future the reorganization of state boundaries in such manner as to bring the lines of social and economic interest and power more nearly to those of the formal government.
2. That in this process the emergent city may, as seen in the great metropolitan regions, find a position among the commonwealth of the states, experimentally at any rate.<sup>1</sup>

He points out that 'industrial and social relations have overflowed the banks of the states, and swept out over the nation in a flood too

ulation had taken up residence in Reno, the state would have become 'urban' in the Census classification, though its density of population had not reached 0.7 per square mile.

	1900			1930		
	Per cent of Population	Per cent of House	Per cent of Senate	Per cent of Population	Per cent of House	Per cent of Senate
States under twenty-five per cent urban.....	32.9	33.4	42.2	5.7	5.5	10.4
States twenty-five per cent to fifty per cent urban.....	31.9	31.6	37.7	32.8	32.8	45.8
States fifty per cent to seventy-five per cent urban.....	30.9	30.8	15.5	43.9	44.1	35.4
States over seventy-five per cent urban.....	4.3	4.1	4.4	17.6	17.4	8.3

<sup>1</sup> C. E. Merriam, *The Written Constitution and the Unwritten Attitude* (1931), 60.

great to be controlled by one state, as in the case of corporations transacting business in many different commonwealths.' Industry, education, the United States Government have begun to recognize various 'regions' as important units in their activity. The Federal Reserve Board operates through twelve 'Districts.' The country is divided into nine areas by the Chamber of Commerce of the United States for the choice of representatives on its board of directors. Boards, commissions, associations by the score — for example, the Commissioners on Uniform Legislation (1892) and the Governors' Conference (1908) — have been established with the purpose of securing in diverse fields a less narrow and more logical basis of representation than the state.<sup>1</sup>

Inevitably the increasing over-representation of the smaller states in the United States Senate has called forth much discussion. Suggestions for new groupings of states as a basis for representation in the Senate were submitted in a contest, sponsored in 1930, by the *Chicago Tribune*. 'Among them was a plan which would retain 31 states as at present, consolidate 17 states into 8, and form 11 city states.'<sup>2</sup>

The suggestion that in the reorganization of state boundaries (which Professor Merriam regards as a matter of imminent importance) the 'emergent city may find a position among the commonwealth of states' reinforces a proposal which has repeatedly been urged, not primarily with the object of making representation in the Senate more just or logical, but of improving the conditions under which state and local government must be carried on. To cite the most striking illustrations: in New York and in Illinois — the first and the third states in the order of numbers and of wealth — more than half of the population and of the wealth is centered in a single metropolitan district, the Greater New York and Cook County. In each of these states, constitutional restrictions prevent representation of the great city in the legislature in proportion to its population, causing constant friction between the 'city' and the 'up-state' or 'down-state' groups in the

<sup>1</sup> ILLUSTRATIONS OF LARGE CITIES AND THEIR SUBURBS, IN 1930

	Population		Population		Population
Boston.....	781,188	New York City	6,930,446	Chicago.....	3,376,438
Suburbs.....	1,527,709	Suburbs.....	1,055,932	Suburbs.....	988,317
	2,307,897		7,986,388		4,364,755
Per sq. m.	2,256.9	Per sq. m.	5,897	Per sq. m.	3,899.8

<sup>2</sup> See *Recent Social Trends* (1933), 1495, Fig. 1. Professor J. Paul Goode's 'Sketch of Political Groupings Based on Economic Areas.' Also, p. 453.

legislature, particularly as to finance and law enforcement.<sup>1</sup> If these two great metropolitan areas were admitted to the Union as new states, each of them would send to the Senate two Senators representing populations of from four to six million people — and the twenty-six Senators from the smallest thirteen states in the Union now represent barely five million!

With a single exception no new state has been ‘erected within the jurisdiction’ of an existing state. In the case of West Virginia, her admission to the Union was a war measure, with a view to securing advantage to the Administration in its military and reconstruction policies through the support of two Republican Senators. Before 1900, the Governor of Wisconsin had appointed a committee to confer with a similar committee to be appointed by the Governor of Minnesota upon a proposal to form a new state with its capital at Superior-Duluth. Back of this proposal — as of other more recent ones — seem to have been the convenience of subdividing the large area so as to bring each state’s government nearer to its citizens, and the similarity of economic interests in the parts of states brought together to form the new state. In repeated instances the anticipated effect upon the balance of party power in the Senate has been a material consideration in determining the fate of statehood bills. During the presidential campaign of 1932, Representative Garner, then Speaker of the House, proposed that Texas be divided into five states — each much larger in population than many a present member of the Union.<sup>2</sup> He em-

<sup>1</sup> April 23, 1933, a group of Chicago voters asked the Illinois General Assembly to petition Congress for the creation of a new state, consisting of Chicago (Cook County) and a few suburban towns. They asserted that Cook County’s development was being hampered by ‘down-state’s’ refusal to reapportion the state, and that Cook County citizens were being taxed without fair representation. Having more than one-half of the state’s population, and furnishing more than one-half of the state income from taxation, Cook County in the National House has but 10 out of a delegation of 27; and in the Illinois general assembly it has but 19 out of 51 senators and 57 out of 153 representatives.

<sup>2</sup> He cited from the joint resolution by which Texas was annexed the provision: ‘New states, of convenient size, not exceeding four in number, in addition to the said State of Texas, and having sufficient population, may hereafter, by consent of the said State, be formed out of the territory thereof.’ Originated in the House, where it was passed by a vote of 120 to 98; passed in the Senate by a vote of 27 to 25, Feb. 27, 1845, *Cong. Globe*, 362–63.

#### PROPOSALS FOR THE ‘REFORM’ OF REPRESENTATION IN CONGRESS

Critics of the present structure of Congress have put forward most diverse proposals for making the National Legislature more representative. Among them are the following:

1. That the Senate be abolished. This has repeatedly been a plank in the Socialist Party platform.

phasized the enhanced power which the present people of Texas would thus attain in the Federal Government: they would continue to elect the twenty-one Representatives assigned to Texas by the last Reapportionment Act, but also they would elect ten Senators, thus tremendously enlarging the influence of Texans and strengthening the grip which Southern Democrats now (1936) hold in the National Government.

#### PARTY REPRESENTATION IN SENATE AND HOUSE

Not only may the Senate and the House at a given time be controlled by different political parties, but it is entirely possible that both of a state's Senators may be Republicans while a majority of its Representatives may be Democrats. In the biennial elections every one of the 435 Representatives comes before his constituents for their verdict. In a single congressional election, conceivably a 'tidal wave' may sweep all the incumbents out and replace them by an entirely new group. On the other hand, from its organization in April, 1789, to the present day, the Senate has been 'a continuing body.' Barring the filling of fortuitous vacancies, each biennial election affects the choice of only one-third of its members, and at the beginning of the first session of the new Congress the Senate takes up its work with a two-thirds majority of 'seasoned' members.

As a result, in the Senate the response to changes in popular senti-

2. That there be proportional representation of the states in the Senate, no state to have less than two Senators.
3. That each state have two Senators, each of them casting a weighted vote, in proportion to the ratio of half the population of his state to the population of the United States. (Weighted votes for Senators were considered in the Federal Convention.)
4. That the more populous states be divided, so as to reduce the present 'injustices' of 'equal suffrage in the Senate.' (E.g. Proposals as New York; Illinois; Texas.)
5. That the number of Senators from each state be reduced to one; and that disagreements between the two Houses be settled by votes of Senate and House in joint convention.
6. That no state at present a member of the Union shall be deprived of its 'equal suffrage' in the Senate, but that by constitutional amendment it shall be decreed that a new state admitted to the Union shall be entitled to only one Senator until its population exceeds a specified number — e.g., 500,000 or 750,000. (Connecticut affords a precedent for such a provision. By her constitution of 1818 it was provided that each city or town, which at that date sent two members to the House of Representatives, should continue to send two — the maximum number; but that a new town incorporated thereafter should be entitled to but one member until its population should reach 5000. As a result, under the Census of 1930 two members are sent to the House by 'towns' of population as follows:

Hartford	164,072	Killingworth	482
New Haven	162,655	Hartland	296
Bridgeport	146,176	Union	196

Such representation suggests that of Nevada in the Senate and of Old Sarum in the House of Commons before 1831.

ment lags, both in the sweep and in the rapidity of change, as compared with the shift in the House.<sup>1</sup> Thus, in the decade 1883–93, which saw Cleveland thrice a nominee for the Presidency, the Democratic strength in the Senate and House varied as follows:

DEMOCRATIC PERCENTAGE OF MEMBERSHIP			
Congress	Date	Senate	House
48th	1883–85	47.4	61.4
49th	1885–87	44.7	55.1
50th	1887–89	48.7	52.3
51st	1889–91	44.0	47.3
52d	1891–93	44.3	69.1

In the second decade of the present century, when popular sentiment was swinging toward the Democrats, they secured a strong lead in the House in the Sixty-Second Congress, but did not control the Senate until two years later. On the other hand, in the House of the Sixty-Fourth Congress the Democratic majority fell off heavily while in the Senate it reached its peak.<sup>2</sup>

Congress	Date	Senate	House
62d	1911–13	45.6	58.3
63d	1913–15	53.1	66.7
64th	1915–17	58.3	53.1
65th	1917–19	55.2	48.3
66th	1919–21	49.0	44.0

It was during this period that the popular election of Senators — which divers states for years had been gradually approximating by their extra-constitutional ‘Oregonian’ devices — came into country-wide effect through the ratification of the Seventeenth Amendment in 1913. There can be no doubt that this change worked to the disadvantage of the Republicans. Theretofore in many states the scheme of representation, assigning to town or county, regardless of population, ‘equal suffrage’ in one branch of the legislature, had in effect weighted

<sup>1</sup> These trends are analyzed in detail by C. H. Woody, *op. cit.*, for the period from 1875 to 1929.

<sup>2</sup> ‘The Democratic Party might well lodge a complaint against the present composition of the Senate. The Republicans were beneficiaries of equal voting during this period (1875–1927), retaining three Senators to whom they were not entitled by population, and losing only one. They also profited by the overlapping, extended terms of Senators. Each time they have controlled the House they have also controlled the Senate, whereas the Democrats were equally fortunate but five out of thirteen times.’ C. H. Woody, *op. cit.*, 238.

the scales heavily against the urban centers where the Democrats were usually stronger than in the rural towns or counties.<sup>1</sup>

<sup>1</sup> G. H. Haynes, *Election of Senators*, 74, 183, 228. For example, from the close of the Civil War to the submission of the Seventeenth Amendment (1865-1912) among the New England States not a single Democrat had been elected to the Senate from New Hampshire, Vermont, Massachusetts, or Rhode Island; and during those forty-seven years Maine had sent but one Democrat to the Senate, and Connecticut, two. During that period, Massachusetts had elected at least four Democratic Governors. Since 1913 there has been a much closer correspondence in party representation in the Senate and House than in the years when Senators were elected by the state legislatures.

#### GROUP 'AFFINITIES' OF SENATORS OF DIFFERENT PARTIES

The formal party affiliations of Senators are of record. Their affiliations or sympathetic co-operation with conservative, progressive, or other blocs are not. On the basis of a variety of criteria — such as attendance at conferences of 'progressives' — Professor Stuart A. Rice has made a careful study in a little-cultivated field. ('The Behavior of Legislative Groups; A Method of Measurement,' *Political Science Quarterly* (March, 1925), 60, 72.) In the personnel of the 68th Congress, he classified as 'radicals,' 13 Senators — 6 Republicans, 5 Democrats, and 2 Farmer-Labor. These, with 9 others (with a reputation for progressive leanings, but less regular in conferences on policy), he classified as the 'progressive group.' If from the first 54 senatorial roll-calls in the 68th Congress seven of trivial importance be excluded, he found that in the remaining 47 significant roll-calls both the radical and the progressive blocs were more cohesive than either of the two great party groups, Republican or Democrat. It seemed that the radical and the progressive groups were more closely aligned with the Democrats than with the Republicans.

#### PARTY DISTRIBUTION IN SENATE AND HOUSE \*

	Rep.	Dem.	Farm-Lab.	Prog.	Ind.	Vacant
73d Congress (Jan., 1934)						
Senate (96)						
Group I (1935)	17	14	1	0	0	0
Group II (1937)	13	19	0	0	0	0
Group III (1939)	5	27	0	0	0	0
	35	60	1	0	0	0
House (435)	117	310	5			3
74th Congress (Jan., 1936)						
Senate (96)						
Group I (1937)	12	19	1	0	0	0
Group II (1939)	5	27	0	0	0	0
Group III (1941)	6	24	1	1	0	0
	23	70	2	1	0	0
House (435).....	104	315	3	7	0	6

\* In this Table the classification follows that of the *Congressional Directory* for the two years. It is not entirely consistent. In 1934, Group I, La Follette is classed as a Republican; in 1936, Group III, as a Progressive.

#### 75th Congress (Jan., 1937)

Senate (96)						
Group I (1939)	4	27	0	0	0	1
Group II (1941)	6	24	1	1	0	0
Group III (1943)	6	24	1	0	1	0
	16	75	2	1	1	1
House (435).....	88	333	5	8	0	1

In the gradual renewal of the Senate by thirds, it is obvious that the election of one-third — e.g., of the 32 Senators elected in November, 1936 — represents the shift of

In the tremendous congressional upheaval wrought by the election of 1932, the Democratic strength in the House jumped from 58.2 per cent to 72.6, while in the Senate the shift in party control, though greater than in any previous election for half a century, brought the Democratic percentage from 48.9 only up to 62.5. But upon most important measures in the following Congress party lines were greatly blurred.

#### LIKENESSES AND CONTRASTS

Opponents of the Seventeenth Amendment used to argue that its principal effect would be to 'make the Senate a smaller House of Representatives.' It cannot be doubted that the election of Senators tends to make the two branches of Congress more alike. It certainly has wrought a considerable change in the attitude of the Senator toward his office. Far less than in former generations can he feel himself to be the 'ambassador of a sovereign state,' chosen by 'a refining of the popular appointment by successive filtrations.' He is now nominated and elected by as direct a vote of the people as is the Governor, and he must court the same publicity and adopt the same campaign methods which candidates for the governorship and for the House of Representatives find most effective. He must win and hold votes in his state, which may range in population from less than 100,000 to more than 12,000,000.

Nevertheless, there are influences, unaffected by the Seventeenth Amendment, which tend strongly to differentiate the Senate from the House. Two men, of the 'same stripe,' may begin congressional service the same day, the one in the House, the other in the Senate, having won their elections by identically the same methods. Yet at once their outlooks and their paths begin to diverge. The Representative finds himself one of 435 Congressmen, the majority of whom may be as inexperienced as is he. His term is for but two years and his chance of re-election is so uncertain that he is not likely to bring his family to the Capital, for the comparatively few months during which that Congress will be in session. Hardly has he taken the oath when he must begin the unremitting attention to his district's interests upon which his re-election will depend. The Senator, on the other hand, enters

sentiment that took place, not between 1934 and 1936, but between 1930 and 1936. This discrimination has a bearing upon the many states whose representation in the Senate is split party-wise; and also upon the startling contrast between a State's Senators in personality. For years Alabama was represented in the Senate by Underwood and Heflin. Could they ever have been elected upon the same ballot?

a continuing body, two-thirds of whose members normally have been colleagues for at least two years. He comes to Washington, not as a transient, who must give almost immediate attention to securing an extension of a short-term 'lease' upon his seat. Assured of six years in the Senate and with fair prospects of re-election, a large proportion of the Senators bring their families to Washington, and establish homes here where they may educate their children and enter into friendly social relations with congenial colleagues and neighbors. Not a few Senators have taken an active and helpful interest in the civic interests of the District, quite aside from their official duties in committee room and on the floor of the Senate.

In the House the new member is likely to find his range of interest and influence far narrower than he had expected. He is a mere legislator, and, inasmuch as new Representatives rarely serve on more than one committee, his intensive personal study is mainly confined to the legislative proposals that fall within its scope. The new Senator, on the other hand, at once has a consciousness of an immensely widened interest and opportunity. He is not a mere legislator. His voice and his vote may count heavily in determining most important matters of foreign relations and of domestic administration. The President of the United States recognizes him as an individual, whose personality and opinions must not be ignored. He is probably a member of not less than five committees, and is at once brought into contact with Senators of great ability and long experience, in handling a wide variety of public questions.

But the greatest cause of differentiation between the Senate and the House is to be found in the rules and procedure under which the members of the one and of the other carry on their work. The membership of the House is so great and the volume of bills and resolutions is so enormous that of necessity its whole procedure is strictly regimented. It has often been said that in a Congressman's first term he can do little more than learn the rules, which seem at every point to check his impulse and effort. But the new Senator finds himself a member of a body so small that for nearly a century and a half it has been able to conduct its proceedings under the simplest of rules or by unanimous consent, easily obtained as a matter of senatorial courtesy. The door of opportunity is wide open. Whether the new Senator have the makings of a statesman or of the rankest demagogue, he may claim as his the right to take the floor, and to speak on whatever subject he chooses. With little 'let or hindrance,' he can be himself.

Woodrow Wilson, in 1908, wrote 'Most of the leading figures among the active public men of the country are now to be found in the Senate, not in the House.' That has not always been the case. As young men, ambitious for a career in statesmanship, both Madison and Clay wisely chose the House as the forum in which to develop their powers. For the House was then but little larger than the present Senate, and the legislative business was so much smaller in volume and simpler in scope that it could be handled without resort to such drastic rules as those whose adoption led 'Czar' Reed to 'thank God that the House has ceased to be a deliberative body!' In the past fifty years it is safe to say that no ambitious young man would have chosen as did Madison and Clay. In fact, the historian of the House has not hesitated to declare: 'Probably no member of the House ever refused an election to that exalted body' — the Senate.

#### CONTACTS BETWEEN SENATORS AND REPRESENTATIVES

The more experienced members of Senate and House are brought into formal official contacts with each other by occasional service together upon joint committees or upon committees of conference. A Senator has frequent occasion to confer with the chairman of the House committee corresponding to any Senate committee of which he is a member, or dealing with any measure in which he is especially interested. Team-play between the Senators and the Representatives from a given state means much for the effective service of that state, and of the country — a consideration too little recognized by the voters in the direct primary.

In the First Congress precedents were established of informal conferences of state delegations. Maclay was in frequent discussion with individual Pennsylvania Representatives, and often — though with serious compunctions as to the spirit or the spirits likely to be there in evidence — attended dinners of the 'Pennsylvania Mess,' at which the interests of the state were discussed.<sup>1</sup> Political parties were then in their infancy. In recent times state legislative conferences are mostly upon a party basis, in regard to political problems within the state, or measures pending in Congress of especial interest to their state.

The senior Senator's influence is largely dominant, and may greatly advance or retard a Representative's congressional career. The Senator often in person heads the party organization in his state, and re-election may prove impossible for the Representative who cannot

<sup>1</sup> Maclay, *Journal, passim*.

have its hearty support. The Senator's political power depends largely upon his control of the patronage within his state, and through its distribution he may reward or discipline a Representative as he thinks the man's personal loyalty or party service deserves.<sup>1</sup>

#### COMPARATIVE SCOPE OF LEGISLATIVE POWER

As to the scope of legislative power assigned to the two branches of Congress, the Constitution made but one discrimination: to the House it gave the origination of bills for the raising of revenue, but it explicitly reserved to the Senate the right to 'propose or concur with amendment as on other bills.'<sup>2</sup> Despite this limitation, at various periods the Senate has dominated financial legislation. Furthermore, the non-legislative powers assigned to the Senate have inevitably brought with them extensive influence over financial legislation. For example, the Senate's part in treaty-making may practically commit the House to appropriations and even to methods and amounts of revenue-raising involved in treaty-made engagements.<sup>3</sup>

Aside from such matters, the control of which has been in part effected by constitutional limitation, it has been the general belief that

<sup>1</sup> In December, 1931, a Pennsylvania Congressman, a Republican, made an astonishing speech on the floor of the House. By insinuation, innuendo, and direct assertion he represented President Hoover as 'the tool of international bankers' who had 'sold out his country to Germany.' From colleagues of both parties and from independents from the country at large at once came protests against such an unprecedented and unsupported assault upon the integrity of the President. Within a few hours after the delivery of that speech it was reported in the press that the Pennsylvania Senators had united in informing Postmaster-General Brown that they would back no nominations presented by the offending Congressman and requesting that no share in patronage be given him. To a letter from the Congressman asking for confirmation or denial of the press report that he had been deprived of post-office patronage at the Senators' request, the Postmaster-General replied: 'As the views which you expressed in the House the 15th instant convince me that your advice will not be helpful to the Department, the heads of the several post-office bureaus have been directed from and after the date mentioned, neither to invite nor follow suggestions from you.' (Washington dispatch, Dec. 22, 1931.) It was announced in the press that the senior Senator was expected soon to confer with other state leaders on a candidate to run with Administration backing against the offending Congressman in the next campaign; but in 1932 he was re-elected. In its monthly bulletin, *Good Government* (published by the National Civil Service Reform League) discussed the 'shameful frankness' of the Postmaster-General's letter, and 'the right of the Administration to use the patronage for reprisal purposes,' and commented: 'The disgusting fact stands out, that public offices are plainly used to pay political debts on a wholesale basis.' (Press report, Jan. 4, 1932.) In 'The Overshadowing Senate' (*Century*, LXV, 513) H. L. Nelson stressed the control over Representatives by Senators, 'who control the organization, who dictate appointments, and upon whose good graces all ambitions depend.'

<sup>2</sup> For the Convention's debate on these provisions, see p. 25. For discussion of the Senate's influence on financial legislation, see Chapter IX.

<sup>3</sup> Matters affecting commerce and tariffs are said to be determined with increasing frequency by treaties or conventions.

the House has taken 'the initiative in legislation of all kinds, while the Senate devoted more time to revising the measures which came up from the lower chamber than to originating measures of its own.'<sup>1</sup> But, as Lodge said, it is probably true that the Senate has initiated more important legislation than the House.

The painstaking studies of Professor Lane W. Lancaster show that from the very start and throughout the first ten Congresses the Senate was aggressive in initiating most varied and important legislation.<sup>2</sup> Thus, on the first day after the presence of a quorum made organization possible, the Senate chose a committee to 'bring in a bill for organizing the judiciary of the United States,' and this bill, with no essential modification in the House, settled the court system of the country for nearly a century.<sup>3</sup> In that First Congress the Senate also initiated the Act regulating the procedure in federal courts, and the first penal statute of the United States. The Senate also took the lead in legislating for the organization and government of new states and territories. During the two periods, 1797 to 1800 and 1806 to 1809, when war was threatening, it was the Senate which was most active in upholding the President.<sup>4</sup> The Senate initiated the Act creating the Navy Department, and giving wide discretion to the President in making war preparations. The Alien and Sedition Acts and the Embargo and Non-Intercourse Acts originated in the Senate. In the field of coinage and banking the Senate initiated the Acts incorporating the Bank of the United States, establishing the Mint, regulating the value of foreign coins, and providing for the punishment of counterfeiting. The Senate originated the Acts for establishing the temporary and the permanent seats of the Government, the first Presidential Succession Act, and the Act prohibiting the importation of slaves after 1808. The conclusion is certainly justified, that from its very beginning 'the Senate was a vigorous organ of government in the initiation of legislation.'

#### WHAT MAY THE SENATE DO ALONE?

By the Constitution the President is authorized 'on extraordinary occasions to convene both Houses or either of them.' Since the only non-legislative functions of the House are those of electing the Presi-

<sup>1</sup> William B. Munro, *The Government of the United States* (1931), 292.

<sup>2</sup> 'The Initiative of the United States Senate in Legislation,' *Southwestern Political and Social Science Quarterly*, June, 1928.

<sup>3</sup> *Ibid.*, 4.

<sup>4</sup> In some later war periods, the Senate was most active in 'holding up' the President (p. 402 ff.). President Wilson's comments on 'a little band of wilful men.'

dent, in case no candidate receives a majority of electoral votes, and of impeaching officers of the United States, the President has had no occasion to convene the House by itself. But the functions which the President must exercise, by and with the advice and consent of the Senate, often necessitate his convening that body in special or extraordinary session.<sup>1</sup> Most frequently the occasion is the need of securing prompt confirmation of the more important nominations for office under a new Administration.<sup>2</sup> Some Presidents who succeed themselves — like Wilson in 1919 and Coolidge in 1925 — have taken the attitude that their heads of departments continue to hold office without the resubmission of their names for Senate approval.

In not more than a dozen instances the President has convened the Senate in ‘called executive session,’ alleging that ‘certain matters touching the public good,’ or ‘some extraordinary occasion,’ or some ‘object of interest’ makes necessary the presence of the Senate. Presidents are reluctant to issue such a call, owing to some uncertainty as to what the Senate may do when it has met in response to the summons. The general ruling has been that ‘at a called special session it is not in order for the Senate to take any action looking to the transaction of legislative business, the House not being in session.’

The ‘extraordinary occasion’ for the President’s convening the Senate alone has often been some question relating to the confirmation of nominations, or the ratification of treaties, or the consideration of some problem concerning foreign relations, not calling for legislative action. A point of order is usually promptly made and sustained against any motion for action outside of this limited range.<sup>3</sup>

<sup>1</sup> A tabulation of Special Sessions of the Senate is printed in each issue of the *Congressional Directory* (Jan., 1937, p. 237).

<sup>2</sup> The usual procedure is for the outgoing President to issue a summons to the Senators and Senators-elect of the new Congress to meet on inauguration day at noon, and the nominations are submitted to the Senate which convenes to receive them immediately after the inauguration of the President.

<sup>3</sup> March 5, 1877, Sherman presented a petition for the payment of a pension to an Ohio man. Conkling raised the question, ‘whether at this called session of the Senate alone legislative business or petitions relating to it can be in order?’

Sherman: ‘My impression is that the Senate has always held that it is a continuous body and can receive petitions, but certainly it cannot do any legislative act at a called executive session.’

Anthony: ‘I was under the impression that petitions could be received at any time, but that no legislation could be had.’

March 6, 1917, Lodge reintroduced the Armed Neutrality Bill. Vice-President Marshall sustained Thomas’s point of order, that as Congress was not in session, the Senate could not transact legislative business. Lodge argued that the Constitution authorized the President to ‘convene both Houses, or either of them’ on extraordinary occasions, and that he could convene the House only for legislative business. ‘The fact that we have also executive business does not seem to me to deprive us of the same rights. I

**THE LEGISLATOR'S RESPONSIBILITY TO HIS CONSTITUENTS**

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**THE RECALL OF SENATORS**

From the days of the framing of the Constitution to the present, it has been a moot question whether a Senator is a state or a federal officer. To whom is he responsible? Hamilton faced the question squarely:

That a man should have power in private life of recalling his agent is proper, because in the business in which he is engaged he has no other object but to gain the approbation of his principal. Is this the case with the Senator? Is he simply the agent of the State? No. He is an agent for the Union, and he is bound to perform services necessary to the good of the whole, though his State should condemn them.<sup>1</sup>

By the Articles of Confederation the state legislatures were authorized to recall their delegates in Congress; and when the Constitution was submitted for ratification there was found to be a widespread feeling that, in view of the Senators' long term, the right of recall ought to be given to the states.<sup>2</sup> In the list of amendments

have seen frequently at extraordinary sessions of the Senate petitions and memorials presented, bills and resolutions introduced and referred.... I have been unable to find anything which debars the Senate from transacting legislative business, if it is so minded.' The Vice-President queried: 'Suppose your bill goes to the Committee on Foreign Relations; suppose it reports it favorably; suppose it is taken up, discussed, and passed by the Senate — what does it amount to?' Lodge replied: 'It will await the summoning of the House. We frequently pass bills when the House is not in session, and hold them for three days.'

At called executive sessions the Senate has occasionally received petitions not strictly pertinent, and passed resolutions; it has pursued investigations as to breach of secrecy, and disciplined recusant witnesses: it has made provision for the payment of mileage and pages, and made calls upon the President for information. Hinds, *House Precedents*, I, sec. 88; H. H. Gilfry, *Senate Precedents*, II, 209.

<sup>1</sup> From debate in Federal Convention. Quoted by Senator George, in Senate debate, Jan. 9, 1926, *Cong. Rec.*, 1744. Is the senatorship a state office was thoroughly discussed in the Nye election case. *Ibid.*, 1680-99; 1737-48.

<sup>2</sup> 'During that time, they may join in measures *ruinous* and *destructive* to their States, even such as should totally annihilate their State Governments, and their States cannot recall them nor exercise any control over them.' Luther Martin, in address to Maryland House of Delegates. (Elliot, *Debates*, I, 361.) On the other hand, in Virginia, Nicholas made the point: 'The dread of being recalled would impair their independence and usefulness.'

proposed in the New York ratifying convention of 1788, one provided:

The Legislatures of the respective States may recall their Senators . . . or either of them, and elect others in their stead, to serve the remainder of the time for which the Senators so recalled were appointed.

For a score of years resolutions proposing amendments of this import were frequently introduced.<sup>1</sup>

Although federal law has never expressly recognized the right of a state legislature to recall or oust a Senator, the legislatures have not hesitated to express freely their views as to their Senators' conduct. The Kentucky legislature denounced Humphrey Marshall for having voted in favor of the ratification of Jay's Treaty, and urged that the Constitution be amended so as to empower legislatures to recall Senators at will. Upon his return to his home, Marshall encountered even more vigorous evidence of resentment. He was seized by a mob, and rushed to a muddy pond, into which he was about to be thrown, when he reminded the rioters that it was the practice of persons, previous to being baptized, to relate their experience. The people desired him to proceed. He thereupon made a witty speech, and 'was conducted to his home with every mark of respect that such a rabble was capable of manifesting to him.'<sup>2</sup> In 1807, the Ohio legislature requested one of their Senators, Samuel Smith, to resign, declaring that he had been guilty of great negligence in not attending to his duty in Washington. One of his colleagues, in his diary, declared that the charge was true, that Smith had been absent frequently, and 'had not attended this session,' and commented:

The proceeding of the Legislature is singular. And query, what can a State do, if a Senator neglects to attend? Perhaps the only remedy is for the Senate themselves, in such a case, to expell the member for breach of their rules in not attending their duty.<sup>3</sup>

At present, when for months at a time a Senator breaks the rule against absence without leave, it would indeed be a 'singular (though salutary) proceeding' if either the legislature or the Senate paid any attention to his negligence.<sup>4</sup>

In ten states constitutional provisions adopted since 1900 apply

<sup>1</sup> Such a resolution was immediately introduced in the House, upon the announcement of the verdict in the Chase impeachment trial, March 1, 1805. *Annals of Congress*, 1214. See J. Q. Adams's comments, *Memoirs*, III, 117.

<sup>2</sup> Plumer, *Memorandum*, 620.

<sup>3</sup> *Ibid.*, 564.

<sup>4</sup> Pages 346-57.

the recall to elective public officers of the state,<sup>1</sup> but only one has elaborated a recall procedure especially applicable to Senators and Representatives in Congress.<sup>2</sup> The Arizona 'Advisory Recall' statute provides that any aspirant for a seat in the United States Senate may file with his nomination petition his signature to 'Statement No. 1':

If elected to the office of United States Senator, I shall deem myself responsible to the people, and under obligation to them to resign immediately, if so requested by an advisory vote.

Or he may sign 'Statement No. 2,' declaring he will not deem himself under obligation so to resign. In accordance with the candidate's action in this matter, the Secretary of State is instructed to place under his name on the ballot: 'Pledged to Advisory Recall,' or, 'Refuses Pledge to Advisory Recall,' or, 'Silent as to Advisory Recall.'<sup>3</sup>

#### INSTRUCTIONS TO SENATORS AND REPRESENTATIVES

In the eighteenth century belief in the right to instruct representatives in legislative bodies was widely prevalent and frequently acted upon.<sup>4</sup> Members of the Congress of the Confederation considered binding the instructions received from their state legislatures. To the Federal Convention came the delegates from Delaware imperatively instructed to vote against any proposition denying to the states equality of representation in Congress.<sup>5</sup>

<sup>1</sup> G. H. Haynes, *The Recall of Officers*, Bulletin 26, Massachusetts Constitutional Convention (1917), 6.

<sup>2</sup> North Dakota, in 1920, passed an Act providing a recall procedure applicable to 'any elective congressional, state, county, judicial or legislative officer.' In the debate over the Nye election case, in January, 1926, this Act was repeatedly cited as evidence that the North Dakota legislature considered their Senators in Congress to be state as well as federal officers.

<sup>3</sup> Arizona Civil Code, 1913, ch. III, secs. 3357-64. The procedure here provided obviously follows the precedent of the Oregon Act, by which popular control of senatorial elections was secured years before the ratification of the 17th Amendment (pp. 100-02).

In July, 1936, Dr. F. E. Townsend declared the intention of his organization to go to Arizona and instigate the recall of that state's Senators by the above process, because of their failure to support the 'Townsend Plan.'

<sup>4</sup> Many illustrations are cited in Foster, *Commentaries on the Constitution*, 495, n. Massachusetts towns often gave instructions to their delegates to the General Court. In 1794, the Anti-Federalists at a Boston town meeting tried to instruct the Congressman from the Boston district. A few years later Berlin and Belfast, Me., voted positive mandates to their congressional Representatives, and Wells undertook to discipline a member of Congress by a vote of censure. (E. G. Bourne, *History of Wells and Kennebunk*, 502; Kenneth Colegrove, *New England Town Mandates*, 444.) Until the World War members of the *Bundesrat* were still compelled by a provision of the Constitution to vote in accordance with instructions of their respective governments. A. L. Lowell, *Public Opinion and Popular Government*, 116.

<sup>5</sup> Failure of some of the delegates in the Virginia convention of 1788 to vote against ratification of the Constitution — as they had been instructed to do — gave rise to charges of breach of faith.

In the very first session of Congress there were considered many proposals for amending the Constitution. In the House it was voted to amend the article asserting the right of the people 'peaceably to assemble and consult for their common good' by inserting thereafter, 'and to instruct their Representatives.'<sup>1</sup> But in the Senate this amendment was defeated by a very heavy vote.<sup>2</sup>

Nevertheless, pronounced difference of opinion upon that point developed in the Senate. Maclay declared: 'We come here the servants, not the lords, of our constituents.' True to that belief, he wrote for publication by a friendly editor 'some pieces' 'with a design to spirit up the State Legislatures to attend to their own importance and instruct their Senators on all important questions.'<sup>3</sup> Presently, South Carolina 'instructed their representation' and Maclay heard colleagues querying: 'Could any hints have gone from here to set them on this measure?' A Philadelphia Representative left for the state capital to try to prevent the legislature's taking similar action upon hints which Maclay was suspected of having given, and some months later Maclay was present while the legislature debated instructing the Pennsylvania men in Congress.<sup>4</sup> Massachusetts Senators produced instructions to them to vote for the Funding Bill.<sup>5</sup>

Presently the Virginia Senators, citing instructions from their legislature, introduced a resolution that from the first day of the next session the doors of the Senate Chamber should remain open. This brought into frank discussion the whole subject of instructions:<sup>6</sup>

Ellsworth: They (instructions) amounted to no more than a wish, and ought to be no further regarded.

Izard: No legislature had any right to instruct at all, any more than the electors had a right to instruct the President of the United States.

Morris: Senators owed their existence to the Constitution, the Legislatures were only the machines to choose them. . . . We were Senators of the United States, and had nothing to do with one State more than another.

Maclay, on the other hand: I declared I knew but two lines of conduct for legislators to move in — the one absolute volition, the other responsibility. The first was tyranny, the other inseparable from the idea of representation. Were we chosen with dictatorial powers, or were we sent forward as servants of the public, to do their business? The latter, clearly, in my opinion. The first question, then, which presented itself was, were

<sup>1</sup> House *Journal*, 107, Aug. 21, 1789.

<sup>2</sup> Senate *Journal*, 117, Sept. 3, 1789. Vote, 14 to 2.

<sup>3</sup> Maclay, *Journal*, 193.

<sup>4</sup> *Ibid.*, 220.

<sup>5</sup> *Ibid.*, 288.

<sup>6</sup> Feb. 24 and 25, 1791, *Annals of Congress*, 1766-68.

my constituents here, what would they do? The answer, if known, was the rule of the Representative.<sup>1</sup>

In Senate debate a dozen years later, Plumer emphasized the point that, although legislatures might properly instruct Senators on some points, it would destroy one of the Constitution's checks if state legislatures should give obligatory instructions to Senators as to proposals of amendments to the Constitution.<sup>2</sup>

The practice of instructing Senators was more prevalent during the second quarter of the nineteenth century than at any other period of our history. Its principle seems then to have been 'fully accepted by one party and partially by the other,' especially in the Southern States.<sup>3</sup> The formula, long in use in such legislative resolutions, gave clear evidence of the belief that Senators, but not Representatives, owed direct responsibility to the legislature. For example:

*Resolved*, by the General Assembly of the State of Tennessee: That our Senators in Congress be instructed and our Representatives requested, to vote against the chartering by Congress of a National Bank.<sup>4</sup>

The basis for this distinction between instructing and requesting disappeared, of course, with the ratification of the Seventeenth Amendment.

How perplexing a personal problem instructions might present to the individual Senator is evident in experiences connected with the famous 'Expunging Resolution.' From the legislature of Alabama there were presented, January 28, 1835, instructions to her Senators to 'use their untiring efforts' to cause to be expunged the Senate resolution of March 28, 1834, declaring that President Jackson had 'assumed upon himself authority and power not conferred by the Constitution.' A fortnight later, Mangum caused to be read in the Senate similar resolutions from the North Carolina legislature, and at once announced that he should not conform to them:

He should vote against the expunging resolution. The legislature had no right to require him to become the instrument of his own personal degradation. He repelled the exercise of so vindictive a power; and when applied to himself, he repelled it with scorn and indignation.<sup>5</sup>

Ultimately, his North Carolina colleague complied with these instructions, but Mangum resigned rather than obey them. From many of

<sup>1</sup> Maclay, *Journal*, 399–400.

<sup>2</sup> William Plumer, *Memorandum*, 50; *Annals of Congress*, 153–54, Dec. 2, 1803.

<sup>3</sup> W. E. Dodd, 'The Principle of Instructing United States Senators,' *South Atlantic Quarterly* (Oct., 1902), 326.

<sup>4</sup> Jan. 13, 1840, *Cong. Globe*, 116–17.

<sup>5</sup> March 3, 1835, *Congressional Debates*, 722.

the states came instructions, some for and some against the passing of the expunging resolution. Virginia's instructions called upon her Senators to vote for the resolution, and added:

It is the duty of the representative to obey the instructions of his constituents or resign the trust with which they have clothed him.

Leigh resigned, alleging ill-health.<sup>1</sup> But John Tyler, scorning such evasion, sent to the legislature his resignation in a stinging letter which set forth the absurdity and hypocrisy to which the practice of legislative instruction of Senators had led. He declared that as a member of the Virginia legislature at twenty-one he had introduced a resolution condemning the conduct of their Senators for having disregarded instructions to vote against rechartering the Bank; that at twenty-five, in the National House of Representatives he had contended that the legislature's instructions were binding. In the present case, he said that recognition of the legislature's right to instruct would have constrained him to obey, if he had been directed to vote to 'rescind' or to 'repeal' the Senate's resolution of 1834. But the legislature's command to him to vote to 'expunge' a portion of the Journal called upon him to violate the Constitution's requirement that the Senate 'keep a journal of its proceedings.' He stressed the fact that in 1834 the Virginia legislature of that session, by majorities of more than two to one in each branch, had instructed their Senators to vote *for* the very resolution which the present legislature was now commanding him to help 'expunge.'

I submit, with all due deference, to yourselves, what is to be the condition of a Senator in future, if, for yielding obedience to the wishes of one Legislature, he is called upon to resign by another? If he disobeys the first, he is condemned; if he obeys the last, he violates his oath and becomes an object of scorn and contempt. I respectfully ask, if this be the mode by which the great right of instructions is to be sustained. May it not degenerate into an engine of faction — an instrument to be employed by the Outs to get *in*?

<sup>1</sup> Leigh had been elected to succeed W. C. Rives, who had resigned in obedience to the legislature's demand, although he frankly declared that he could not believe that the legislature had truly represented their Virginia constituents in the instruction to Senators Tyler and Rives to vote for Clay's resolutions condemning Jackson. He made a strong speech in the Senate, announcing his decision to resign. On the same day Tyler declared in the Senate that he should 'use all the means in his power to carry them [the instructions] in effect. (Feb. 22, 1834, *Congressional Debates*, 636-39.) Rives evidently was right in his interpretation of Virginia opinion, for he was re-elected to succeed Tyler, when he resigned, and continued to serve from 1836 to 1845.

Naming nine men who had voted for the 1834 instructions, and who, as members of a later legislature, had voted for the instruction to 'expunge,' he added:

This is the first time a Senator has been forced to resign for obeying instructions, and that by the very men who gave them....

A seat in the Senate is sufficiently elevated to fill the measure of any man's ambition, and, as an evidence of the sincerity of my conviction that your resolutions cannot be executed without violating my oath, I resign into your hands three unexpired years of my term.<sup>1</sup>

To fill the vacancy thus caused, the Virginia legislature promptly elected Rives, who had resigned from the Senate in 1834, because he could not conscientiously obey the legislature's instructions of that year.<sup>2</sup>

With the passing of the states'-rights party the doctrine of instructions was largely abandoned, and in later years as little attention came to be paid by Senators to 'instructions' as by Representatives to 'requests,' members of both branches of Congress seeming to accept the view that an officer has a property right in his office.<sup>3</sup> There have been some notable instances of Senators' refusing to obey instructions, but retaining their seats. None of these better deserves being recorded than the experience of Lamar, the first of the Confederate generals to become prominent in Congress after the Civil War. Upon three different and important issues the legislature of Mississippi had instructed her Senators: to oppose the retirement of General Grant with pay; to oppose the seating of Kellogg as Senator from Louisiana; and to support the Bland Silver Bill. On each of these measures Lamar voted contrary to his instructions — indeed, on the floor of the Senate he most earnestly opposed the Silver Bill. This aroused great

<sup>1</sup> Tyler's letter of resignation to the Virginia General Assembly, dated Feb. 29, 1836. (L. G. Tyler, *Letters and Times of Tyler*, I, 537.) On the same date, there was read in the Senate a letter from Tyler announcing his resignation. Tyler's action was highly commended by some elements throughout the Union. His break with Democratic leaders in Virginia made him seem to the Whigs 'available' as their candidate for the Vice-Presidency in 1840. At a public dinner one of the toasts was: 'Our honored guest, John Tyler — "Expunged" from a post that he adorned, and the functions of which he ever faithfully and ably discharged, by the complying tools of an unprincipled aspirant, he is the more endeared to the hearts of his countrymen.' *The Statesman's Manual* (1849), 1226.

<sup>2</sup> H. L. White's career in the Senate was terminated because of his non-compliance with instructions from the Tennessee legislature, Jan. 13, 1840.

<sup>3</sup> This doctrine of *Hoke v. Henderson*, cited by W. E. Dodd, in 'The Principle of Instructing United States Senators,' *South Atlantic Quarterly* (Oct., 1902), 326. Interesting studies might be made of the use of the 'instruction' in different states. See 'The Instruction of United States Senators by North Carolina,' by Earl R. Franklin, *Historical Papers*, Trinity College, N.C. (Series 7), 5-15.

resentment in Mississippi. No friend, no newspaper defended his action. It was everywhere agreed that he had committed political suicide. In his first address, after his return from Washington, he told his hearers frankly that he had come to give an account of his stewardship, and took up each count in the indictment against him, explaining the reasons for his vote. He went about the state, talking in this quiet, dignified way. As a result, he was re-elected to the Senate by an overwhelming majority — a refreshing illustration of the leadership which may be exercised by a wise man who has courage enough to act in accordance with his honest convictions, regardless of temporary popularity.<sup>1</sup>

The last refusal of a Senator to comply with a legislature's instruction prior to the adoption of popular election of Senators was that of Heyburn (Idaho), who refused to vote for the Seventeenth Amendment, a measure which he had persistently opposed.<sup>2</sup>

During the discussion of the Vare election case, Reed of Pennsyl-

<sup>1</sup> Lamar's first speech, after his return to Mississippi, deserves to stand with Burke's famous address to his Bristol constituents. He related one of his own war experiences with telling effect. He was on a blockade-runner that was making for Savannah Harbor. On board were several prominent officers of the Confederate Army and Navy. They held a consultation and decided that it would be perfectly safe to go into Savannah. But the captain of the ship sent a sailor — one Billy Summers — to the topmast with a glass, to see if he could discover any Yankee gunboats in the harbor; and Billy reported that he counted ten United States gunboats lying there. The officers conferred. They decided that Billy must be wrong, as they knew where the Yankee fleet was at that moment, and they told the captain to go ahead — they would take the chances. But the captain said 'No!' — while he recognized that they knew a great deal more about naval affairs than could an ordinary sailor, still he thought that Billy Summers, from his position at the topmast with a powerful glass, had so much better opportunity to judge of the situation that he should be governed by Billy's advice, and get out of there as soon as possible. It turned out that Billy was right, and that, had they gone in, they would all have been captured. Lamar said that he did not claim to be wiser than the Mississippi legislature, but he believed that, like Billy Summers, he was in a better position as a member of the United States Senate to judge what was for the interest of his constituents. Hiram R. Steele (who heard this speech) in '*An Independent Legislator*', *Outlook*, July 7, 1920.

<sup>2</sup> Probably no Senator's refusal has matched in bluntness the message which 'Davy' Crockett, Congressman from Tennessee, is said to have sent to his constituents whose demands he was unwilling to fulfill: 'I am going to Texas, and you can go to Hell!'

Legislative instructions have covered a wide range of subjects. In 1894, the Kentucky House instructed that state's Senators to oppose the confirmation of Wheeler H. Peckham for the Supreme Bench. In 1903, it is needless to say that South Carolina's Senators yielded willing compliance with the instruction to attempt to prevent confirmation of the nomination of the Negro, Crum, as Collector of the Port of Charleston. In 1925, the Michigan House passed a resolution favoring the Senate's confirmation of Warren's appointment as Attorney-General, and criticizing a Michigan Senator for opposing it. The Michigan Senate had not acted upon this resolution. State party conventions or state committees have at times assumed to instruct Senators. Shields refused to obey such an instruction from the Tennessee Democratic convention to cease opposing ratification of the Treaty of Versailles. *Outlook* (July 7, 1920), 468.

vania announced his intention of asking the legislature of his state to submit a referendum on the subject of prohibition to the people of his state. The debate called forth divergent views as to a Senator's 'responsibility' to his constituents, since the adoption of election of Senators by popular vote:

Reed: I think it is a crowning shame that the election of a United States Senator should have turned on an issue on which the successful Senator will probably not have a chance to vote in his six years in office.

Borah: Does the Senator contend that if the people of Pennsylvania should vote in a majority against the Volstead Act, a Senator having a conviction against their action should surrender his conviction to the popular vote?

Reed: Mr. President, on matters that come up afresh, on which the popular judgment is merely a first impression, I do not regard myself as bound, because I think that the first judgment of the people is about as often wrong as right. But the nearest we can come to wisdom is the settled conviction of the public on a subject on which they have had a chance to think, and to watch the workings of an experiment, and I believe that they have had that chance to think on the wet and dry question, and I believe that their judgment is wiser than mine is, and I regard myself as bound by it.

Borah: The fundamental principle upon which this government was originated was that of representative government, not referendum or a pure democracy, but that the people select a representative, and that that representative is to represent their views if they are in harmony with his. If he has convictions against them, their remedy is to retire him. . . .

Reed: . . . This question has become so acute that we are entitled to know what our people think of it, and when I do know, I shall consider myself, as their representative, bound to follow their judgment.

Borah: Of course, it is acute, and we are bound to dispose of it, but I trust we are not going to have injected into our system of government the principle that a Senator here merely records, as a clerk or an amanuensis, what he thinks the popular judgment has determined in his state.<sup>1</sup>

It is of interest that Borah, who here contended that a Senator should vote according to his own convictions even when he believed them to be opposed to the 'popular judgment' in his state, was the leader foremost in the final struggle which had secured the Senate's consent to the submission to the states of the Seventeenth Amendment giving to the people the election of Senators.<sup>2</sup>

<sup>1</sup> May 19, 1926, *Cong. Rec.*, 9676.

<sup>2</sup> Page 108 ff.

The Senator's 'responsibility to his constituents' may sometimes carry a quite different meaning from that discussed above. It may raise that question, in the vernacular, What is it 'up to him' to do for them? Constituents' requests are of the greatest vari-

Since the ratification of the Seventeenth Amendment it cannot be claimed that United States Senators are in any peculiar degree 'responsible' to the state legislatures. Some of the states, however, even before 1913, had provided methods accordant with the direct primary, the initiative, and the referendum, whereby the voters may express their opinions upon matters of public policy. These laws may now be made to afford a means by which in effect the voters may 'instruct' their Senators and Representatives in Congress. Thus, under the Massachusetts 'Public Opinion Law' of 1913, upon petition of the required number of voters in any senatorial or representative district, a question may be placed upon the ballot, and if the vote thereon receives a majority of all the votes cast at that election, it shall be regarded as an 'instruction' to that district's senator or representative in the Massachusetts General Court.<sup>1</sup> In the November election of 1928, through the activity of the 'Constitutional Liberty League' upon the ballot in thirty-six out of the forty senatorial districts of the Commonwealth there was placed the following:

#### Question of Public Policy

Shall the senator from this district be instructed to vote for a resolution requesting Congress to take action for the repeal of the Eighteenth Amendment to the Constitution of the United States, known as the prohibition amendment?

ety, ranging from an application for public documents or for a card to the Senate gallery to an appeal for personal favors of the most preposterous character. Any Senator of long service could fill a volume with samples of such claims made upon his time and strength. (See humorous article, transparently anonymous, 'A Senator's Day,' in *The Nation's Business* (Feb., 1927), 27.) Senator Reed of Pennsylvania once declared that the Senator is called upon at the same time to serve as a college professor and as a bell-hop, often finding it almost impossible to secure five consecutive minutes in the day's session for attendance in the Senate Chamber. To a Senator from a state where constituents number many millions the burden of correspondence and errand-running often involves heavy drafts upon the Senator's private purse, for the hiring of clerks and stenographers (p. 895). But a shrewd politician, ambitious for re-election, knows that prompt and courteous service to constituents, without demurring as to the reasonableness of their requests, is an investment highly productive of votes if of no other dividends. An effective campaigner, before starting for Washington to resume his seat in the Senate, recently introduced an innovation by announcing in the press the name of the man who 'would be his personal representative' in the capital city of his state, maintaining headquarters in the Senator's local office, 'where he will devote several hours a day to meeting any of the Senator's constituents who may care to confer with him.' It was intimated in this announcement that business and industrial leaders, as well as individual constituents, might thus be brought into the closest possible communication with their representative in the Senate at Washington. (D. I. Walsh, in press dispatches of Dec. 1, 1926.)

<sup>1</sup> G. H. Haynes, *The Public Opinion Law of Massachusetts*, Bulletin 7, for the Constitutional Convention of 1917. This discusses also similar measures in Illinois, Delaware, Texas. See also Bulletin 6, *The Initiative and Referendum*.

In thirty-four out of these thirty-six districts the returns showed a decisive 'Yes' vote upon this question, and the number of persons who participated in this 'public policy' vote represented seventy-eight per cent of the total ballots cast in the general election on that day — a percentage which has rarely been exceeded in Massachusetts' century and a half of voting upon legislative or constitutional questions.<sup>1</sup>

Senators may receive less formal 'instructions' from divers other sources. A governor may assume the rôle of instructor.<sup>2</sup> Senators' offices are deluged with telegrams, letters, and resolutions from every

<sup>1</sup> The aggregate vote upon this question was approximately 707,352 Yes to 422,655 No.

In accordance with this 'instruction,' the Massachusetts Senate, by a vote of 26 to 6 passed a resolution, transmitting this 'Question of Public Policy' and the vote thereon to the presiding officers of both branches of Congress, and requesting Congress to 'take action for the repeal of the 18th Amendment.' This resolution was presented in the Senate by Walsh, Feb. 8, 1929, and in the House by McCormack, March 3, 1929.

To what extent do constituents' letters and telegrams represent their individual interest and judgment as to governmental matters, or to what extent are these messages 'inspired' by single individuals or pressure groups? In the first nine weeks of 1934 and 1935, 'tabs' were kept on the letters from constituents received in the office of Senator David I. Walsh (Mass.). The daily average of letters thus received, week by week, was as follows:

Week	Year 1934	Year 1935	Week	Year 1934	Year 1935	Week	Year 1934	Year 1935
1	173	200	4	332	505	7	331	409
2	221	259	5	233	882	8	288	262
3	351	262	6	248	402	9	351	800

The week in which a daily average of 882 letters was received was the one in which the Reverend Charles Coughlin exhorted his hearers to urge their Senators to oppose adherence to the World Court. (Walsh voted against it.) The flood of 800 letters in the ninth week consisted mainly of letters in opposition to the Rayburn-Wheeler Bill to regulate public utility holding companies (Walsh voted against its passage), and of letters asking for the repeal of the 'pink slip' of the income tax law — requiring income-taxpayers to report on such a slip, for public records, many details as to their income. Throughout the year, numerous letters were received, urging support of the 'Townsend Plan.' These four questions — World Court, holding companies, 'pink slip,' and 'Townsend Plan' — represented the major causes of the letters from 'pressure groups.'

As Senator and Chairman of the Committee on Education and Labor, Walsh was allowed five clerks and secretaries, and as chairman of an investigating committee he had three clerks. But he had to employ four additional clerks to handle the mail in his office which doubled in that year.

In March, 1926, in a New York Senator's office the daily average of letters received was 206, and of letters sent out, 127. Visitors numbered 1041. (H. F. Holthorsen, *James W. Wedsworth, Jr.*, 185: 'A Month's Work Tabulated.') Such details emphasize the burden upon a Senator's health and purse if he attends to all the demands which such correspondence imply. In his *Autobiography* (p. 223), ex-President Coolidge declared: 'Of all public officials with whom I have ever been acquainted, the work of a Senator of the United States is by far the most laborious. About twenty of them died during the eight years I was in Washington.'

<sup>2</sup> A governor of Massachusetts telegraphed to one of her Senators urging him to repudiate 'the baseless and reprehensible' Democratic attacks upon President Coolidge. The Senator published a denunciation of the governor's action as 'extreme partisanship.' (March 8, 1924.)

conceivable organization, urging action for or against specific measures.<sup>1</sup> On 'burning issues' often thousands of communications are in such standardized phraseology as to suggest a common source, however individual the signatures, and Senators not unnaturally discount their significance, and sometimes launch investigations to determine the source and the cost of such propaganda.<sup>2</sup> The alert 'supervision' of Congress by salaried legislative agents of organizations maintaining headquarters in Washington has been discussed elsewhere.<sup>3</sup> Their influence for good or for ill may be tremendous.

In these days of 'direct democracy' many a Senator seems hesitant to vote upon a new issue or an old question in a new form until the people of his state have passed upon it.<sup>4</sup> Hence, the frequent suggestion that the pending question ought first to be made the subject of a state if not of a national referendum. Senators who eagerly seek such mandates ignore the fact that the men who won for the Senate its pre-eminence were willing to assume responsibility for their own action. When asked what South Carolina would think of his action in a certain case, Calhoun replied:

I never know what South Carolina thinks of a measure. I never consult her. I act to the best of my judgment, and according to my conscience. If she approve, well and good. If she does not, or wishes anyone else to take my place, I am ready to vacate. We are even.<sup>5</sup>

<sup>1</sup> How shall such 'instructions' be appraised? Miss Rankin, first woman to be elected to Congress, told of one Representative who used to have his secretary sort into different stacks the messages for and against a given measure, and then with a yardstick determine the height of the *pro* pile as compared with the *con* pile, and thus was his vote decided!

<sup>2</sup> For example, the investigation of the alleged 'propaganda' in connection with the 'Bok Peace Prize' in 1924.

<sup>3</sup> Pages 495 ff.

<sup>4</sup> Probably more Senators received instructions from their legislatures as to how they should vote in the impeachment trial of Andrew Johnson than upon any other matter in the history of the Senate. It is said that most of the seven 'recusant Republicans' voted in disobedience to specific instructions. As the time for the decisive vote drew near, Henderson was visited by five (out of the eight) Missouri Representatives, who insisted that they represented their state's sentiment for a verdict of 'guilty,' and that Henderson would be false to the trust committed to him if he voted for acquittal. Unwilling to waive his own convictions, Henderson was nevertheless so impressed that he submitted to his callers a proposition that he telegraph his resignation to the Governor of Missouri, giving him an opportunity at once to name a stop-gap Senator who would vote for Johnson's conviction. Later, however, he retracted this proposal, mustered up his courage, and voted, 'Not Guilty.' D. M. De Witt, *The Impeachment and Trial of President Andrew Johnson*, 522-29.

<sup>5</sup> J. W. Moore, *The American Congress*, 246.

## **XX**

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THE CHANGING SENATE

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I trust we are not going to have injected into our system of government the principle that a Senator here merely records, as a clerk or an amanuensis what he thinks the popular judgment has determined in his state.

SENATOR WILLIAM E. BORAH

Two things are certain. One is that the problems with which Senators must nowadays wrestle have not decreased in number or complexity. The other is that Senators to whom these problems are presented must divide their time between the task of solution and the political work essential to success in open primaries and in state-wide elections.... The open primary and the state-wide election were necessary parts of the modern revolt against abused authority. It is too early to affirm whether or not the change is salutary and permanent. However this may be, it is certain that the Senate is no longer Mt. Olympus; but it is also true that Pennsylvania Avenue is a very different thoroughfare from Main Street.

EX-SENATOR GEORGE WHARTON PEPPER

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## XX

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### THE CHANGING SENATE

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THE Constitution of the United States came from the Federal Convention as an instrument of compromise. Its ratification, in the words of John Adams, was 'extorted from a reluctant people by grinding necessity.' The delegates' individual ideals and theories had had to give way; for at times the task of reaching an agreement upon a draft Constitution that could stand some chance of being accepted by nine states had seemed hopeless. Once ratified, it became the typical example of a 'rigid' constitution.

In almost every phrase relating to the Senate there is reflected the delegates' anxious compromising. The result was a legislative body unique in its basis of representation, in its relation to the Executive and to the other branch of Congress, in its procedure, and in its weighty non-legislative powers. It was designed to be a small body, associated with the President somewhat as an executive council, acting as judge in the trial of all impeachments, serving as a check upon 'the changeableness, precipitation, and excesses of the first branch,' especially as the guardian of the small states against aggression on the part of the large states, and as the protector of all the states against encroachment by the new 'centralized power.' And it was to be the people's defender against 'the turbulency of democracy.'

For more than a century not a word of the Constitution relating to the Senate was altered. Nevertheless, long before the end of that period the Senate had outstripped the House in power and prestige, had become the only 'Upper Chamber' dominant in a national legislature if not the most powerful single legislative body in the world. In spite of the Constitution's alleged 'rigidity,' the Senate has constantly been in process of change. And the end is not yet.

#### INCREASE IN SIZE OF THE SENATE

The admission of each new state to the Union has not merely increased by two the membership of the Senate — in material degree it has lessened the Senate's fitness for exercising those distinctive powers from which its pre-eminence has largely been derived.<sup>1</sup> Madison clearly foresaw this result:<sup>2</sup>

The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom than the popular branch. Enlarge their numbers and you communicate to them the vices which they are meant to correct.... Their weight would be in inverse ratio to their number.

In the Convention's debates the point was repeatedly stressed that the trial of impeachments and the giving of advice and consent in the making of treaties and in the confirming of nominations were properly assigned to the Senate because in so small a body there would be found the coolness of judgment requisite in a 'High Court of Impeachment' and the 'secrecy and despatch' essential in the handling of treaties and nominations impossible to be secured in a large and popularly elected body like the House. But 'small' and 'large' are relative terms. The Senate's membership of twenty-two in its first session has grown to ninety-six — larger by half than the House of sixty-five which the 'framers' had considered far too unwieldy and maladroit for the exercise of such delicate functions. No constitutional convention of the present day would for a moment consider the assigning of such powers to a popularly elected legislative body of nearly one hundred members.

#### THE INEQUALITY OF THE STATES' 'EQUAL SUFFRAGE' IN THE SENATE

In the Federal Convention the most momentous provision in the 'Great Compromise' was that which assured to the several states equal representation in the Senate — an assurance more strongly entrenched than any other compact in the Constitution by the guarantee that 'no state without its own consent shall be deprived of its equal suffrage in the Senate.' Although each state's 'equal suffrage' remains unchanged, and was intended to be unchangeable, the result-

<sup>1</sup> Ulterior motives have often hastened or delayed the admission of states, the party in power in Congress seeking more electoral votes and more votes in the Senate, e.g., in the premature admission of Nevada and Colorado. Some later political forecasts proved highly disappointing — in 1896.

<sup>2</sup> *Debates*, 71.

ing inequality is steadily becoming more preposterous. In agreeing to this compromise the large states made a great concession for what proved to be a trifling consideration: they abandoned their insistence that the states' representation in Congress should be proportional to their population, and consented to equal representation in the Senate, on condition that the apportionment of direct taxes as well as the apportionment of representation in the House should be in proportion to the population of the several states. For more than a century and a quarter the burden of direct taxes proved to be very slight, whereas the states' disparities in population were rapidly becoming far greater than the Constitution framers had imagined possible. In the First Congress two Senators gave to Delaware her 'equal suffrage' with Virginia, a state whose population — twelve and a half times that of Delaware — nearly equaled the aggregate population of six of the smaller states. A century and a half later, in the Seventy-Third Congress, Nevada, with a population of 91,058, has equal weight in the Senate with New York, with a population of 12,588,066 — more than 136 times that of the silver state. Like every state in the Union, Nevada is allotted at least one Representative in the House. If actual proportionality to population were the rule, the apportionment which gave one Representative to Nevada would assign to New York, not 45, but 135. The aggregate population of twelve states falls nearly 1,200,000 below half the population of New York:

- 5 States (N.Y., Pa., Ill., Ohio, Tex.) elect 10 Senators; 151 Representatives
- 5 States (Nev., Wyo., Del., Vt., N.M.) elect 10 Senators; 5 Representatives
- 2 States (N.Y., Pa. — population 22,219,416) elect 4 Senators; 79 Representatives
- 24 States (population 21,547,843) elect 48 Senators; 77 Representatives
- 6 Senators represent 3 States (N.Y., Pa., Ill.). Population 29,850,-070
- 6 Senators represent 3 States (Nev., Wyo., N.M.). Population 739,940

To what extent and in what respects the several states' 'equal suffrage' results in misrepresentation has been discussed elsewhere.<sup>1</sup> Various proposals have been made for 'mending or ending' what many regard as a great and growing injustice. In successive presidential campaigns the platforms of the Socialist Party have called for the abolishment of

<sup>1</sup> Pages 1008-10.

the Senate, leaving the making of our laws entirely to the House. Under another proposal, two Senators would be elected from each state as at present, but each Senator would cast a vote weighted in proportion to the ratio of half the population of his state to the population of the United States.

In rapidly increasing rate, the growth of wealth and its redistribution among a much larger population, the progress of science and invention, the new means of communication bringing the whole world closer together and making isolation impossible, the adoption of woman suffrage — these and other transformations have made the problems with which the Senate must deal far more numerous and immensely more complicated.

The unrepresentative character of the Senate's personnel has been the subject of frequent comment, and in recent years political scientists have given much study to the possible advantages of occupational representation as compared with the representation of political parties, or governmental units, or blocks of population. The constitutional barriers to change of the states' 'equal suffrage' in the Senate have seemed almost insuperable. But contiguous states already have a considerable degree of representation of their common interests. Proposals have already been put forward (accompanied by a map prepared by an eminent geographer) for a possible regrouping of states for Senate representation in such wise as to make the new group-area boundaries conform more closely to those which economic or occupational interests would make natural.<sup>1</sup>

In any realistic study of congressional representation it is highly pertinent to keep in mind that the Senate and the House now work under the eyes and subject to the pressure of hundreds of leagues, federations, associations, corporations, etc., which maintain permanent headquarters in Washington, and act through highly paid and skilled counsel or agents, among the most assiduous and effective of whom are 'political lawyers' and former members of the Senate and House.

#### SENATORS ELECTED BY DIRECT POPULAR VOTE: SEVENTEENTH AMENDMENT

For nearly a century and a quarter after the Federal Convention completed its task, no formal change was made in the Constitution's provisions as to the Senate. Then came the ratification of the Seven-

<sup>1</sup> Page 1012, n. 1.

teenth Amendment. For some years before the opening of the new century, conditions had been ripening toward that change. The election of Senators by direct vote of the people was a later phase of the movement to democratize American government, a movement which had begun to manifest itself many years earlier in the broadening of the suffrage, the multiplication of elective offices and the shortening of their terms, the putting of constitutional curbs upon the powers of state legislatures, and the widespread adoption of the initiative and referendum, and the recall.

Many and serious abuses and scandals connected with the election of Senators by state legislatures brought that procedure into disrepute, and the record of members sent to the Senate by legislative choice aroused suspicion that Senators elected by legislators — in many cases obviously open to corruption or to political manipulation — could not be trusted to safeguard the public interest.

In *The Election of Senators* (1906), the present writer set forth the causes for dissatisfaction and resentment which were then resulting in the agitation for the popular election of Senators. His point of view was stated thus:

This book will fall far short of its purpose if it fails to carry the writer's firm conviction that electoral forms and methods are of slight import, except as they affect the spirit of the choice; and that neither the continuance of the present system, nor the resort to popular election, can long secure the Senate that the best interests of the country demand, unless back of the method there be found the vigilance, the intelligence, and the conscience of the individual voter.

For a score of years this issue was before Congress. Beginning in 1893, in five Congresses the House adopted resolutions providing for popular election of Senators. Its votes ranged from the 'two-thirds' requisite for a constitutional amendment to 185 to 11, and 242 to 15. Meantime, the Senate — a party in interest — did not allow such a resolution to reach a vote. May 12, 1912, the proposed amendment received the requisite congressional approval, and state ratifications came in so rapidly that a year later, May 31, 1913, it was proclaimed a part of the Constitution.

For many years William Jennings Bryan had been an ardent advocate of popular election of Senators. By a happy coincidence it now fell to him, as Secretary of State, to make official announcement that the Seventeenth Amendment had become a part of the Constitution. As the glad day approached, he declared: 'I will proudly attach my

name to the statement that this epoch-making reform has arrived.' Then came upon him the spirit of prophecy:

We will find that instead of having the Senate filled up with the representatives of predatory wealth who use their power to oppose the things that the people love — we will find that the honor of a position in that body will be reserved as a prize with which to reward those who have proven themselves capable of the discharge of public duties and men to be trusted with the people's interests.

The purist did not fail to note that this was not a mere forecast, but that the repetition of that phrase — 'we will find' — indicated a fixed determination to find the representatives of predatory wealth eliminated from the Senate, and their places reserved as prizes for those who seek 'the things that the people love.' As a matter of fact, for nearly a decade this 'epoch-making reform' had been in process of 'arriving,' and its salutary effects had already been largely discounted. For many years, without change in the letter of the Constitution, but by the adoption of some modification of the 'Oregon Plan,' states had been sending to the Senate members who were as truly 'the people's choice' as are any who are today being elected by direct vote of the people. But in some other states the arrival of 'this epoch-making reform' was by no means precipitate. Probably in the Senate of 1913 in Secretary Bryan's thought no member more clearly typified those who there 'used their power to oppose the things that the people love' than Boies Penrose of Pennsylvania. Three times he had been elected to the Senate by the legislature. In the year following the ratification of the Seventeenth Amendment he became a candidate for re-election by popular vote. To a 'reformer' friend he commented thus upon the result:

Give me the People, every time! Look at me! No legislature would ever have dared to elect me to the Senate, not even at Harrisburg! But the People, the dear People, elected me by a bigger majority than my opponent's total vote — by over half a million. You and your 'reform' friends thought direct election would turn men like me out of the Senate! Give me the People, every time!<sup>1</sup>

<sup>1</sup> Talcott Williams, 'After Penrose, What?' *Century* (Nov., 1922), 51. Penrose was here 'speaking in round numbers,' but his victory was tremendous. With six candidates in the field, 46 per cent of the total vote was for him, and he beat Pinchot, the leading opponent, by a plurality of 250,655. Six years later, though his health was seriously impaired, from his sick-bed in Atlantic City by telephone he exercised an influence which may have been decisive in the nomination of Harding at the Chicago convention. A few months later his 'dear People' re-elected him to the Senate. Again six candidates were in the field; 60 per cent of the votes were cast for Penrose, and he won by a clear majority of 354,199! He died Dec. 31, 1921. Nor has 'the people's choice' in senatorial elections yet ceased giving some strange results (p. 1074 ff.).

Eight weeks before the issuance of this proclamation there was convened first in special session the Sixty-Third Congress — the last in whose Senate all of the ninety-six members were placed in office by the method of election ordained by the Constitution, the discredited process then on the eve of being discarded by the Seventeenth Amendment. At that time the present writer made a study of the personnel of that Senate, seeking information as to who were its members, what they represented, what had been their educational training, their business, professional, and political experience, and what were the apparent 'qualifications' which had made them the most 'available' candidates for choice by the state legislatures. He fully recognized how inadequate were the data for making an accurate analysis of the makeup of that Senate. But he attempted it in the expressed hope that 'when studies are made of the Senate of a score of years hence, it will be of interest, as a basis of comparison, to revert to certain easily ascertained facts as to the personnel of the last Senate elected by the process ordained by the framers of the Constitution.'<sup>1</sup>

In directing attention to some comparisons between the Senate of 1913 and the Senate of 1933, the writer emphatically disclaims the implication that the adoption of the Seventeenth Amendment has been the sole or the dominant cause of contrasts or apparently new trends. In the first place, Oregon had already taught the other states how to secure the essence of popular election of Senators through the pledging of candidates for the legislature to vote for 'the people's choice' for Senator. Quite aside from the method of election, even before the turn of the century the spirit of government throughout the country had been undergoing changes which would inevitably have been reflected in the personnel of the Senate.

<sup>1</sup> The present writer has made five successive studies of Senate personnel. In them all he has been trying to apply consistently certain uniform classifications, in order that these studies might afford a basis for comparison. The main sources of information, of course, have been the autobiographical sketches of Senators in the *Congressional Directory*, supplemented by material from the *Congressional Biographical Dictionary*, and *Who's Who in America*, and current press comment.

These personnel studies have appeared as follows:

1906. *The Election of Senators*. (Henry Holt & Co.) Analysis of the personnel of the Senate in the 54th to 58th Congresses, 1895-1905, with especial study of the last. Pp. 71-99.
1911. 'Congress' and 'The Senate,' in *Cyclopedia of American Government*. The personnel of the Senate in the 61st Congress, in 1910.
1913. 'The Changing Senate,' *North American Review* (Aug., 1914), 222-34. A study of the Senate of the 63d Congress, 1913.
1924. 'Senate: New Style,' *Atlantic Monthly* (Aug., 1924), 252-63. A study of the Senate of the 68th Congress, 1923.
1936. The present book. A study of Senate personnel in the 73d Congress, 1933.

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## CHANGES IN PERSONNEL

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### BIRTHPLACE

In the Senate of the Seventy-Third Congress (1933) all but four of its ninety-six members were born in the United States, and the great majority of them represented their native states. Ohio, for many decades the 'Mother of Senators,' still maintained her lead, seven being sons of that state.

### AGE OF SENATORS

Contrary to the general belief, there has been an increase, not a decrease, in the age of Senators. In the first session of the Senate (April, 1789) the average age of its members was forty-eight, more than half of them being on the sunny side of fifty. In 1913, in the last Senate elected by state legislatures, the average age was fifty-seven — seventy-six of its members being past fifty. In 1933, after twenty years of popular election, the average age was over fifty-eight, and eighty-one of its ninety-six members were past fifty; of the twelve New England Senators the average age was sixty-two — precisely the same as the age of the oldest Senator in the First Congress! More significant than the average age of Senators is their distribution in age-decades. In 1883, 73 per cent of the Senators were past fifty years of age. By 1913 that percentage had risen to 79, and by 1933 to 85. Statistics show, also, a slight increase in the average age at which Senators in recent years are beginning their service in that body.

The prevalent illusion that the 'Senate is growing younger' may be due in part to the advancing age of the gallery observer who compares his today's impressions with those made upon him by the Senate of twenty or thirty years ago.<sup>1</sup> Senators' heavy beards and formal frock coats of the eighteen-eighties have disappeared; clean-shaven faces and informal business suits are now almost universal. Senators

<sup>1</sup> An alumnus, returning to successive class reunions, is more and more struck by the tender years of the college youth of today, whereas his own classmates were probably younger than the undergraduates of recent years.

of today, even in their seventies, take justifiable pride in their golf scores, but it is hard to imagine a foursome made up of Clay and Webster, Calhoun and Benton, or of their successors of 1900, Aldrich and Frye, Hoar and Sherman! The actual increase in the average age of Senators of late has been due in part to the advanced age at which some members enter the Senate by appointment at the hand of governors who have political obligations to discharge or personal ambitions to be realized.<sup>1</sup> Thus, upon the death of Senator Thomas J. Walsh, March 2, 1933, the seventy-year-old Governor of Montana promptly resigned and was succeeded by the Lieutenant-Governor, who forthwith (March 13) appointed his predecessor to fill the vacancy in the Senate. Two months later, a man in his eightieth year was appointed to fill a vacancy caused by the death of another Western Senator.

#### EDUCATION

In the United States educational classifications are notoriously lacking in uniformity and precision, but it is of some interest to note an increase in the proportion of 'college-trained' men. In the period from 1895 to 1905, not quite two-thirds of the Senators had received such training. In 1933, the proportion had risen to four-fifths, Harvard leading the list with six graduates, and Yale and the University of Michigan each represented by five sons.

#### LEGISLATIVE EXPERIENCE

Of the members of the First Senate more than four out of five had seen service in the Continental Congress or in the Congress of the Confederation (1781-89), and three out of four had had experience in state legislatures. In 1910, that proportion had shrunk to 43 per cent; in 1913, to 35 per cent; in 1933, to 28 per cent. In 1913, the proportion of Senators who had served in the National House of Representatives was 36.5 per cent, but in 1923, it had dropped to 31.3 per cent, and in 1933 to 28.1 per cent. Of the twenty-five Senators of 1933 who had been 'graduated' from the House into the Senate, fourteen had served in the lower branch from ten to twenty years; only two had served but a single term. Of the twelve Senators who took the oath for the first time, March 4, 1933, only three had served in state legislatures, and only two in the National House.

<sup>1</sup> Cynics have remarked a similar preference for venerable candidates on the part of the College of Cardinals, in the election of a Pope.

**MILITARY SERVICE**

Distinguished service in arms has always commended a candidate to the American voter. In the first session of the Senate seven of its twenty-two members had been officers in the Continental Army. A full generation after the Civil War was over, one out of three of the members of the Senate was a veteran of that conflict. Out of a total of thirty-seven Southern Senators of the period 1895 to 1905, twenty-eight were Confederate veterans. Several states (Alabama, Florida, Mississippi, and Virginia) were making their choice exclusively from such war heroes. As late as 1913, the Senate included ten Civil War veterans — five from the Union and five from the Confederate ranks — and five veterans of the war with Spain. Not till 1929 did the last Civil War veteran disappear from the Senate. In 1933, seventeen of the members of the Senate, as indicated in their autobiographical sketches, had had some part in military service, varying from that of colonels and majors overseas to less precisely defined statuses, such as: 'Designated to incidental service in Europe and reporting to President Wilson'; or, 'Member American Legion.'<sup>1</sup> In years to come the proportion of World War veterans in the Senate is likely to show a decided increase, not only because the rank and file have but recently begun to reach the age natural for senatorial candidacies, but for the no less politically pertinent reason that — as actual military service rendered becomes more shrouded in the mists of tradition — the political pressure of militant veterans' organizations, heretofore largely exerted in drives for bonuses and various preferences in the civil service, will then be more importunately seeking offices and pensions.

**WEALTH IN THE SENATE**

In the years before the election of Senators by popular vote, cynics often referred to the Senate as the 'Millionaires' Club.' In newspaper lists of American millionaires the names of many Senators appeared, and more discriminating estimates placed a considerable percentage of the membership in that class.<sup>2</sup> To men of large wealth a senatorship

<sup>1</sup> In the list of 'Ex-Service Members of Congress in the 74th Congress, 2d Session, January, 1936,' compiled by the Legislative Reference Service of the Library of Congress, there were already 16 ex-service men in the Senate, and 120 in the House — more than one in four.

<sup>2</sup> Senator O. H. Platt said that in a membership of 90 there might be 10 who would be called millionaires, and perhaps four or five who possessed several millions, while about 40 might be considered in comfortable circumstances, and the other 40 would be

presents a great lure — the opportunity to exercise power and enjoy prestige for himself and for his family of a quite different quality from that which may attach to the acquisition or inheritance of a great fortune. Mark Hanna is not the only millionaire who has found his highest gratification in his years spent in the Senate.

Sponsors for the Seventeenth Amendment predicted that its adoption would put an end to the 'buying of seats.' A decade later the Senate's staunchest defender stressed the statement, 'There are more men of meager financial incomes in the Senate today than ever before in its history'; and in 1929, he declared, 'Statistics show a smaller percentage of members of great wealth, although there are still in the Senate an exceedingly large number of members of great worldly possessions.'<sup>1</sup>

Not a few Senators of large wealth have brought to the Senate great ability. Even the 'merely rich' Senator may be of far less discredit and injury to the Senate than the member who aspires to be rich, and uses his office as a means to that end. In the future no man will deliberately choose for his residence the state in which he thinks he can buy an election to the Senate, as apparently did J. Edward Adicks, whose manipulations of the Delaware legislature during three successive Congresses deprived that state of her 'equal suffrage in the Senate.' Nor are such flagrant practices as those of Clark and Mitchell, of Lorimer and Stephenson likely to secure seats. But such disclosures as have been made in the investigation of primary and election campaigns — especially those of 1926 and 1930 in Illinois and Pennsylvania — have shown the enormous advantage possessed by the candidate backed by great wealth, making it a matter of some doubt whether in some states the candidate of small means is not more heavily handicapped than ever before.<sup>2</sup> Certainly the attainment of

considered as poor in any community. (Speech in Bridgeport, 1900.) He added: 'The Senator poorest in worldly goods may weigh most in the deliberations of that body, and the man richest in worldly possessions may weigh the least.' The *World Almanac* of 1902 listed 18 Senators among the millionaires. H. L. Nelson's estimate was that more than a score of men were in the Senate who would not be there but for the possession of great wealth. A group of close observers of the Senate in 1905 classified eight of its members as men whose great wealth was the chief if not the sole explanation of their presence in that body, while four more were believed to be there mainly because they were Senators highly acceptable to great corporate interests. G. H. Haynes, *Election of Senators*, 86-89.

<sup>1</sup> One of them, in a letter to the Secretary of the Treasury, Jan. 11, 1924, declared: 'In 1920, based on 1919 income, I paid 65 per cent surtax, or a total of \$7,229,161.75 to the Federal Treasury.' See speeches of Senator David I. Walsh, June 4, 1924, May, 1929.

<sup>2</sup> For cost of senatorial primaries and elections, see pp. 541-44.

genuine democratic control by means of the direct primary and popular election of Senators 'requires an interest and a technique which have not yet been mastered.'

#### GOVERNORS IN THE SENATE

There have been few more striking evidences of the contrast in the attractiveness of a seat in the Senate in earlier times and in recent years than may be found in the large number of governors who now seek membership in that body. Rarely do ex-governors constitute less than a fourth of the Senate. It may be questioned whether any governor would now cling to his state office if assured of a probable election or appointment to the Senate. In fact, the alacrity with which governors have yielded to that temptation has led some states to try by constitutional provision to prevent such desertion.<sup>1</sup>

In repeated instances, governors, elected to the Senate, have delayed presenting their credentials and taking the Senator's oath, while they clung to the office of governor, it might be for many months, to prevent the succession of a lieutenant-governor of an opposing party or faction, or in order to continue pressure upon the legislature for measures which the governor had sponsored.<sup>2</sup>

This 'gubernatorial' element in the Senate personnel seems likely to increase. Now that election to the Senate is by direct vote of the people, the governorship is the office in which a would-be Senator can most effectively display the qualities which — although they may not

<sup>1</sup> J. T. Robinson's schedule was as follows: Jan. 14, 1918, resigned from the House of Representatives; Jan. 16, inaugurated Governor of Arkansas; Jan. 28, elected Senator; sworn in as Senator, March 10.

In December, 1924, Hiram Bingham in Connecticut was at the same time Lieutenant-Governor, Governor-elect and Senator-elect. Jan. 7, in the afternoon he took the oath as Governor and delivered his inaugural address. In the evening he attended the inaugural ball. The next morning he resigned and started for Washington. Soon after noon, Jan. 9, he took the oath as a Senator.

Constitution of Utah, art. VIII, sec. 23: 'The Governor shall not be eligible for election to the Senate of the United States during the term for which he shall have been elected Governor.'

In Alabama 'the Governor cannot run for the U.S. Senate until two years after his term of office.' In 1937, to fill the vacancy caused by the resignation of Senator Black, forward-looking Governor Bibb Graves appointed his wife, Dixie Graves, and thus kept the Senate seat in the family.

<sup>2</sup> D. B. Hill, elected Jan. 21, 1891, took oath Jan. 7, 1892, having continued to serve as governor in the interim.

R. M. La Follette, elected Jan. 25, 1905, took oath Jan. 4, 1906. He was governor in the interim.

H. P. Long, elected Nov. 4, 1930, did not take the oath as Senator till Jan. 25, 1932, continuing to serve as governor meantime. Hoke Smith, Hiram Johnson, and W. E. Edge were other governors who did not at once resign, but they did so in time to be sworn in to the Senate at the beginning of the next session following their election.

necessarily be the ones which will best fit him for valuable service in the Senate — are those which will best focus upon him the attention of the voters who can send him thither.<sup>1</sup> The disgraceful records of governors in many states since 1910 afford little assurance that the attainment of that office is in itself evidence of high caliber for the Senate. More than one man, removed from the governorship by impeachment, has sought 'vindication' in a primary campaign for nomination for the Senate, but without success.

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#### LENGTH AND CONTINUITY OF SERVICE IN THE SENATE

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'The way to make a great Senator is to send a man to the Senate in his early prime. If he is possessed of character, industry and capacity, he will grow into a place of leadership'<sup>2</sup> — provided he is given time!

It is unfortunate that in the direct-primary choice of candidates this 'growth factor' receives far less attention than Senate history proves it deserves.<sup>3</sup> Not only do added years bring to the young Senator, as to other young men, a greater maturity in thought and action, but he gains in mastery of procedure, in familiarity with legislative issues, in intimate acquaintance with colleagues of many years, and in the tact which long experience should give. Moreover, it is to its seniors in service that the Senate's distinctive rules and usages open the greatest opportunities for influence. Men of excellent capacity, entering the Senate late in life, have often proved disappointments to themselves and to their constituents.<sup>4</sup>

<sup>1</sup> One ex-governor in the Senate made his boast that he had pardoned or paroled 1650 prisoners who had been sentenced for murder, burglary, or other crimes, and that on one day he had granted full pardons to 1000 former state prisoners whom he had paroled. (Blease, South Carolina.) For years, James A. Reed (Senator from Missouri) used to record in the *Congressional Directory* that as prosecuting attorney for Jackson County (1898–1900) he tried 287 cases and secured convictions in 285 of them.

<sup>2</sup> Editorial, *Boston Herald*, Nov. 29, 1916.

<sup>3</sup> 'In no other legislative body in the world do the older members govern more supremely, and the conservatism of old age is tritely proverbial.' (L. G. McConachie, *Congressional Committees*, 270.) The Senate needs men of vigor and outlook.

<sup>4</sup> J. D. Works, who had been a justice of the supreme court of California before entering the Senate in his sixty-fifth year, declined to stand for re-election at the end of a

In the state conventions to which the Constitution was sent for ratification the six-year term of Senators was frequently criticized as too long a tenure for an elective office. But the Senate's annals show that more than threescore of its members have served twenty or more years in that body. In several respects the accompanying list (Table I) is highly significant. In the first place, it is at once apparent that this group includes a surprisingly large proportion of the men who have built up and maintained the Senate's power and prestige. The level of ability among them has been high; though some grew conservative with advancing years, few 'lagged superfluous on the scene.' Only three of these long terms of service began in the first forty years of the Senate — a period during which many a man of ability and ambition was tempted away from the Senate to accept office in the service of his home state or city. That no one of the 'Great Triumvirate' saw twenty years of senatorial service was due neither to his undervaluing the honor and the opportunity which attached to the Senator's position, nor to disapproval on the part of his constituents, but to his call to high duties elsewhere. Webster was a Senator for more than nineteen years, but at two different crises resigned from the Senate to become Secretary of State. After two brief periods of service upon appointment to fill vacancies in the Senate, Clay entered the House where in five Congresses he exercised great power as its Speaker and then served for four years as Secretary of State, before returning to the Senate. Calhoun became a Senator at fifty, having already served six years in the House and seven years as Vice-President, resigning that office in order that he might combat President Jackson more effectively on the floor of the Senate. Contemporary with these major statesmen was Missouri's Benton, whose monumental *Thirty Years' View of the American Government* records the annals of the Senate from 1820, the year of his state's admission to the Union, to 1851. This record of continuous service was equaled by that of Cockrell (Missouri), 1875 to 1905, and during twenty-four years of that period his state colleague, Vest, was continued in the Senate by repeated uncontested elections.

Yet these long records have been exceeded by those of three other Senators, all of whom 'died in harness.' They were: Morrill (Vermont), 31 years, 9 months; Allison (Iowa), 35 years, 5 months; and single term, declaring: 'I came to the Senate too late in life to render any great or lasting service to my country if I were otherwise competent and able to do so.' On the other hand, Pettus (Ala.), who entered the Senate at seventy-six, served a full decade with a good degree of effectiveness.

Warren (Wyoming), 37 years. More than a fourth of the Senators mentioned in this list served for thirty years or more.<sup>1</sup>

For obvious reasons re-elections are more frequent in the cases of Senators from states of small than from states of large population. A Senator of ability and of political sagacity can far more easily impress his personality upon the electorate of Nevada or Wyoming or Idaho<sup>2</sup> than upon the electorate of New York or Pennsylvania or Illinois. Moreover, in his campaigning the Senator from one of the small states is vastly helped by the fact that his government-paid staff of secretaries and clerks is the same in number and in aggregate pay as that of a Senator who must 'cultivate' a constituency fifty or a hundred times as numerous and far more varied in its interests. In the states of the Northeast the rivalry for a Senate seat is keener and more persistent. In the Far West a band of sparsely settled states whose interests are mainly in agriculture or mining stretches from the Canadian border to the Rio Grande. Common economic interests draw politically minded men together, and in the Senate the 'Farm Bloc' and the 'Silver Bloc' are the result.

Of the threescore and more Senators who have served more than twenty years, only twelve were fifty years of age on entering the Senate, and twelve were below forty. Thus, more than four out of five began senatorial service in their forties or younger, with the prospect of many years of vigorous prime in the Senate. On the other hand, of the sixteen men who entered the Senate for the first time in the seventy-third Congress (between March 4 and November 11, 1933) the average age was 57.6 years, the range being between forty-five and eighty. Only four of them were less than fifty years of age.

Another striking fact, shown by this table, is that of these sixty and more men of longest service in the Senate, almost exactly one-half were graduates from that most effective of training schools, the House of Representatives, in which fourteen of them had served not less than eight years. Hale, Morrill, and Swanson had each been twelve years in the House, and Curtis sixteen. It has been said that

<sup>1</sup> Aside from those mentioned above were the following: Hale and Frye (Me.), Lodge (Mass.), Aldrich (R.I.), Sherman (Ohio), Cullom (Ill.), Simmons (N.C.), Morgan (Ala.), Teller (Col.), Smoot (Utah), Jones (Wash.). Before entering the Senate, Morrill had served twelve years, and Allison eight years, in the House.

<sup>2</sup> See Dr. R. Earl McClendon's painstaking study, 'Re-elections of Senators,' *American Political Science Review* (Aug., 1934), 636-42. Note his rigidly limited definition of 're-election,' (p. 639).

TABLE I. SENATORS WHO SERVED TWENTY YEARS OR MORE (1789-1933)

STATE	SENATORS	IN SENATE	AGE AT ENTRANCE	IN HOUSE
Maine	Hamlin	25	39	42
	Hale	30	44	45
	Frye	30	40	50
New Hampshire	Gallinger	27	31	54
Vermont	Morrill	32	44	47
	Edmunds	25		38
	Dillingham	23		47
Massachusetts	Sumner	23		40
	Hoar	27	34	49
	Lodge	31	37	43
	Webster	19	34	45
Rhode Island	Knight	20		41
	Anthony	25		44
	Aldrich	30		40
Connecticut	Hawley	24		55
	Platt, O. H.	26		52
New York	0			
New Jersey	0			
Pennsylvania	Cameron, J. D.	20		37
	Penrose	24		37
Delaware	0			
Maryland	Smith, S.	23	49	51
	Gorman	21		42
Ohio	Sherman, J.	32	34	38
Indiana	Voorhees	20	39	50
Illinois	Cullom	30	36	54
Michigan	Chandler, Z.	21		44
Wisconsin	La Follette	20	36	50
Virginia	Daniel	23	34	45
	Martin	24		48
	Swanson	23	35	48
West Virginia	0			
North Carolina	Ransom	23		46
	Overman	27		49
	Simmons	30	42	47
South Carolina	Gaillard	21		39
	Tillman	23		48
	Smith, E. D.	24		43

TABLE I — *continued*

STATE	SENATORS	IN SENATE	AGE AT ENTRANCE	IN HOUSE
Georgia	0			
Alabama	King, W. R.	28	33	5
	Morgan	30	53	0
Mississippi	0			
Arkansas	Berry	22	44	0
	Robinson, J. T.	24	34 41	10
Texas	Culberson	24	44	0
	Sheppard	20	30 38	10
Kentucky	0			
Tennessee	Harris	20	24 59	4
Florida	Fletcher	24	50	0
Oklahoma	0			
Minnesota	Nelson	28	52	6
Iowa	Allison	35	43	8
Missouri	Benton	30	39	0
	Cockrell	30	42	0
	Vest	24	49	0
North Dakota	McCumber	24	41	0
South Dakota	0			
Nebraska	Norris	20	30 52	10
Kansas	Curtis	20	36 47	16
Montana	Walsh, T. J.	20	54	0
Idaho	Borah	26	42	0
Wyoming	Clark, C. D.	22	22 44	4
	Warren	36	46	0
Colorado	Teller	30	46	0
New Mexico	0			
Arizona	Ashurst	22	37	0
Utah	Smoot	30	41	0
Nevada	Stewart	28	37	0
	Jones, J. P.	30	44	0
	Pittman	20	41	0
Washington	Jones, W. L.	23	43 46	10
Oregon	Mitchell	22	38	0
California	Perkins	22	54	0

most of the Senate's expert parliamentarians have been graduates of the House.<sup>1</sup>

Thirty-eight states have sent men to the Senate for service of more than twenty years. Despite their 'youth,' all but three of the states admitted to the Union since the Civil War have such long-service Senators on their rolls.<sup>2</sup>

Ten states have had no Senators of twenty years' service. Several of these have been so recently admitted to the Union that such long service on the part of their Senators was not to be expected, although Arizona, Idaho, Montana, and Wyoming have elected men whose service in the Senate has spanned almost the entire life of their respective states. On the other hand, some of the older states have been notably fickle. From 1789 to 1933, New York had upon her roster of Senators forty-five men, yet only five of them served two full terms (Rufus King, Seward, Depew, Platt, and Wadsworth), and only two of these were members of the Senate for more than twelve years. During the first seventy years of the Senate, more than half of New York's Senators resigned. In one hundred and forty-two years only five of Kentucky's sixty-two Senators served more than a single term. Before 1850, fourteen of Massachusetts' twenty-four Senators had resigned, but since that date her sixteen Senators have served on the average of nearly eleven years.

In the twenty years following the ratification of the Seventeenth Amendment, the people of the larger states were the more fickle in their senatorial selections.<sup>3</sup> New York re-elected but two out of her six Senators; Pennsylvania, three out of eight; Illinois, two out of eight; Ohio, three out of nine; New Jersey, two out of ten. On the other hand, New Hampshire, Vermont, and Nevada re-elected three

<sup>1</sup> The long list would include King (Ala.), Gaillard (S.C.), Clay (Ky.), Anthony (R.I.), Ingalls (Kan.), Edmunds (Vt.), Frye (Me.), Lodge (Mass.), Underwood (Ala.), Clarke and Robinson (Ark.), Lenroot (Wis.) and Curtis (Kan.). In the list are found a large proportion of the Presidents *pro tempore*, and of the floor leaders. Two Senators who began service in the 72d Congress were already skilled parliamentarians. White (Me.) for several Congresses served as secretary to the President of the Senate, and as private secretary to Frye, long the President *pro tempore*. Clark (Mo.) was parliamentarian of the House during four years of his father's speakership.

<sup>2</sup> At the end of the period covered by this table (Jan., 1934) there were in the Senate six members who were well advanced in their third six-year terms: Hale (Me.), King (Utah), McKellar (Tenn.), Trammell (Fla.), Walsh (Mass.), and Gore (Okla.).

<sup>3</sup> Of course the frequency of change may not be due to any fickleness on the part of the state. It may be due to the filling of vacancies caused by resignation, voluntary retirement, or death. (Pennsylvania by death lost three Senators in less than ten months: Knox, Oct. 12, 1921; Penrose, Dec. 31, 1921; Crow, Aug. 2, 1922.)

out of five; Wyoming and Arizona, three out of four; Montana and Utah, three out of three, and Idaho, two out of four.

It conduced to a degree of patience with the anomalous 'equal suffrage' of the states in the Senate to note that in character, ability, and statesmanship of their Senators small states have often excelled the states of largest populations and have thus exercised a stronger and more beneficial influence. In the days of the Spanish-American War there were in the Senate many men of exceptionally high caliber, but New York was there represented by Murphy and T. C. Platt. Pennsylvania by Quay and Penrose, and Illinois by Cullom and Mason. Those three states comprised nearly a fourth of the population of the country. Yet in the Senate each one of them was represented by Senators 'who had no comprehension of statesmanship and no ambition to have even a formal prominence in anything relating to it. Their mission was to dispense of patronage, and to strengthen the machine by which they had secured power.'<sup>1</sup> Leadership in the Senate was then in the hands of men from Vermont (Proctor and Morrill); Massachusetts (Hoar and Lodge); Rhode Island (Aldrich); Maine (Hale and Frye); Connecticut (O. H. Platt); Delaware (Gray); Iowa (Allison and Dolliver); Georgia (Bacon); and Alabama (Morgan). Nor has the advent of popular election wrought any revolutionary change in this respect. Small-state men bring to the Senate their full share of its vision and constructive ability, while with some of our most powerful states are associated the most notorious election scandals, the choice of small-caliber Senators, or the failure to retain in the Senate their young men of highest promise.<sup>2</sup>

<sup>1</sup> Editorial, *Boston Herald*, Feb. 4, 1898.

<sup>2</sup> It was Woodrow Wilson's contention that capacity for clear thinking was not best developed nor were political choices most successfully made in congested city environments. 'The bad ways [of choosing Senators] have been oftenest illustrated where population is the thickest, or in a few recently created states, which, because of their peculiar economic character, are dominated by a single interest or a single group of interests.' Conditions seemed to him more normal in Western and Southern States. 'The purchasing power of money in politics is chiefly exerted where there is most money. The selfish influence of great corporations is most often exhibited where they have their seats of control. The processes by which men procure places in the Senate have been most often under suspicion where men buy most things.' *Constitutional Government in the United States* (1908), 124-25.

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### TRENDS IN COMMITTEE CHAIRMANSHIPS

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The work of the Senate, whether in lawmaking or in dealing with nominations and treaties, is done mainly by its standing committees. To the chairmen of the more important committees falls a very considerable measure of leadership. Though the choice of these chairmen and the election of the standing committees is often the unchallenged and perfunctory ratification of 'slates' already determined upon in party conference or caucus, the fate of the Senate's most important work for that Congress may turn upon the selections thus made.<sup>1</sup> It is of significance, therefore, to note any trends which may reveal themselves in the distribution of these posts of power.

The accompanying table (Table II) lists the chairmen of twenty-five of the more important Senate standing committees, decade by decade, from 1884 to 1934, and specifies the state which each chairman represented. By an unexpected coincidence it chances that each stage in this series marks a change in party control, starting with the Republican Senate in the Forty-Eighth Congress and ending with the Democratic Senate in the Seventy-Third Congress.<sup>2</sup>

That Senators reach chairmanships by reason of the 'seniority rule,' and of the broad experience which that rule should imply, finds renewed confirmation in this table: Of the one hundred and forty-six chairmanships, one in three were men whose names have been listed among those who served in the Senate twenty years or more; and half of this large group of chairmen had seen service in the House of Representatives.

This table shows a very striking trend in the shifting of a large proportion of these chairmanships from the urban and industrial states of the North and East to the rural and agricultural or mining states of the South and West. In the years when the Democrats have been in control nearly half of the chairmanships have been held by

<sup>1</sup> Page 285.

<sup>2</sup> In comparing these lists of chairmen, the middle-aged reader may be interested to ask himself how large a proportion of the chairmen in successive decades seem 'assured of a place in history,' as gauged by his own knowledge of their 'significance.'

TABLE II. CHARMEN OF PRINCIPAL SENATE COMMITTEES

COMMITTEES	1884	1894	1904	1914	1924	1934
	Miller, N.Y. Allison, Iowa	George, Miss. Cockrell, Mo.	Proctor Vt. Allison, Iowa	Gore, Okla. Martin, Va. Owen, Okla.	Norris, Neb. Warren, Wyo. McLean, Ct.	Smith, S.C. Glass, Va. Fletcher, Fla.
Agriculture	Ransom, N.C.	Frye, Me.	Clarke, Ark.	Jones, Wash.	Stephens, Miss.	
Appropriation	Call, Fla.	Perkins, Cal.	Pomerene, Ohio	Stanfield, Ore.	Bulow, S.D.	
Banking and Currency	Pasco, Fla.	Warren, Wyo.	Bryan, Fla.	Capper, Kan.	Bailey, N.C.	
Commerce	Kyle, S.D.	McComas, Md.	Smith, Ga.	Borah, Ida.	Walsh, Mass.	
Civil Service	Voorhees, Ind.	Aldrich, R.I.	Simmons, N.C.	Smoot, Utah	Harrison, Miss.	
Claims	Morgan, Ala.	Cullom, Ill.	Bacon, Ga.	Lodge, Mass.	Pittman, Nev.	
Education and Labor	Hawley, Ct.	Dillingham, Vt.	Colt, R.I.	Colidge, Mass.	Coolidge, Mass.	
Finance	Cameron, Wis.	Blair, N.H.	Stewart, Nev.	Harrold, Okla.	Wheeler, Mont.	
Foreign Relations	Blair, N.H.	Butler, S.C.	Elkins, W. Va.	Commings, Iowa	Dill, Wash.	
Immigration	Morrill, Vt.	White, Cal.	Bard, Cal.	McNary, Ore.	Bratton, N.M.	
Indian Affairs	Miller, Cal.	Pugh, Ala.	Hoar, Mass.	Brandagee, Conn.	Ashurst, Ariz.	
Interstate Commerce	Dawes, Mass.	Gibson, Md.	Heyburn, Ida.	IaFollette, Wis.	Bulkeley, Ohio	
Irrigation	Sawyer, Wis.	Rate, Tenn.	Hawley, Conn.	Wadsworth, N.Y.	Sheppard, Tex.	
Judiciary	Edmunds, Vt.	Stewart, Nev.	Scott, W.Va.	Oddie, Nev.	Logan, Ky.	
Manufactures	Riddleberger, Va.	McPherson, N.J.	Hale, E. Me.	Hale, F., Me.	Trammell, Fla.	
Military Affairs	Logan, Ill.	Platt, Conn.	Gray, Del.	Tillman, S.C.		
Mines and Mining	Bowen, Col.	Mitchell, Penn.	Palmer, Ill.	Kittredge, S.D.	Ernst, Ky.	
Naval Affairs	Cameron, J. D., Penn.	Platt, Conn.	McCumber, N.D.	James, Ky.	Bursum, N.M.	
Patents	Hill, Col.	Mitchell, Penn.	McCumber, N.D.	Shirley, Ind.	Sterling, S.D.	
Pensions	Hoar, Mass.	Hill, Col.	Penrose, Penn.	Bankhead, Ala.	Spencer, Mo.	
Post Offices and Post Roads	Plumb, Kan.	Hoar, Mass.	Burrows, Mich.	Kern, Ind.	Ladd, N.D.	
Privileges and Elections	Frye, Me.	Plumb, Kan.	Berry, Ark.	Myers, Mont.	Overman, N.C.	
Public Lands	Richardson, Ind.	Blackburn, Ky.	Blackburn, Ky.	Spooner, Wis.	Pittman, Nev.	
Rules		Faulkner, W.Va.	Faulkner, W.Va.	Beveridge, Ind.	Curtis, Kan.	
Territories					Johnson, Cal.	Copeland, N.Y.

Southern Senators. Thus, of the twenty-five chairmen of these committees in the Seventy-Third Congress (1933) only two came from New England, three from other states north of the Ohio and east of the Mississippi, eight from the West, and twelve from the South. But the transfer of this great element of Senate leadership from New England and other states of the Northeast to the West had been even more striking in the years when Republicans in the Senate held an uncertain control which was likely to vanish at any moment after committee assignments had been made with the fleeting co-operation of Western 'Progressive Republicans,' whom Smoot called 'Republicans for a day.' This trend is clearly seen in this distribution of Republican chairmanships:

Section	1884	1904	1924
New England	8	7	5
North Atlantic	4	1	1
North Central	4	4	1
West of Mississippi	6	9	17
South	1	3	1

In the chairmanship lists of 1924 and 1934 there is striking evidence of the large proportion of these positions which go to the states of smallest population. In 1924, four states (New York, Pennsylvania, Illinois, and Ohio) had an aggregate population of 31,349,914, or practically thirty per cent of the (1920) population of the Union. Each of these states' delegations in the House was Republican and seven of their eight Senators were Republicans. But only New York secured a single one of these twenty-five committee chairmanships. On the other hand, seventeen, or more than two-thirds of them, went to fifteen Western States with an aggregate population of 19,245,499, or about eighteen per cent of the population of the Union. Nine of those states, aggregating a population less than that of Ohio, secured eleven chairmanships, and to the other six were allotted one apiece. It is pertinent to note that at the time when these chairmen were elected, Wadsworth of New York, alone of the seven Republican Senators from these four large states, had completed a single term in the Senate; all the others were relatively new men, who had not had time to climb the ladder to the chairmanship level.<sup>1</sup> On the other hand, nine of the seventeen Western chairmen had served in the

<sup>1</sup> See McCormick's protest against assignment of chairmanships solely on the basis of seniority (p. 300).

TABLE III. TWENTY-FIVE SENATE COMMITTEE CHAIRMEN AND RANKING MINORITY MEMBERS, SEVENTY-FOURTH CONGRESS, SECOND SESSION, 1936

COMMITTEE	CHAIRMAN	RANKING MEMBER
Agriculture	Smith, S.C.	Norris, Neb.
Appropriations	Glass, Va.	Hale, Me.
Banking and Currency	Fletcher, Fla.	Norbeck, S.D.
Commerce	Copeland, N.Y.	McNary, Ore.
Civil Service	Bulow, S.D.	White, Me.
Claims	Bailey, N.C.	Capper, Kan.
Education and Labor	Walsh, Mass.	Borah, Ida.
Finance	Harrison, Miss.	Couzens, Mich.
Foreign Relations	Pittman, Nev.	Borah, Ida.
Immigration	Coolidge, Mass.	Johnson, Cal.
Indian Affairs	Thomas, Okla.	Frazier, N.D.
Interstate Commerce	Wheeler, Mont.	Couzens, Mich.
Irrigation	Adams, Col.	McNary, Ore.
Judiciary	Ashurst, Ariz.	Borah, Ida.
Manufactures	Bulkley, Ohio	Metcalf, R.I.
Military Affairs	Sheppard, Tex.	Carey, Wyo.
Naval Affairs	Trammell, Fla.	Hale, Me.
Patents	McAdoo, Cal.	Norris, Neb.
Pensions	McGill, Kan.	Frazier, N.D.
Post Offices	McKellar, Tenn.	Frazier, N.D.
Privileges and Elections	George, Ga.	Hastings, Del.
Public Lands	Wagner, N.Y.	Norbeck, S.D.
Rules	Neely, W. Va.	Hale, Me.
Territories	Tydings, Md.	Nye, N.D.
Mines and Mining	Logan, Ky.	Frazier, N.D.

TABLE IV. CHAIRMANSHIPS OF MAJOR COMMITTEES: SENATE AND HOUSE

COMMITTEE	SENATE		COMMITTEE	HOUSE	
	1928	1933		1928	1933
Agriculture and Forestry	McNary, Ore.	Smith, S.C.	Agriculture	Haugen, Iowa	Jones, Tex.
Appropriations	Warren, Wyo.	Glass, Va.	Appropriations	Madden, Ill.	Buchanan, Tex.
Commerce	Jones, Wash.	Stephens, Miss.	Commerce	Parker, N.Y.	Rayburn, Tex.
Finance	Smoot, Utah	Harrison, Miss.	Ways and Means	Hawley, Ore.	Doughton, N.C.
Foreign Relations	Borah, Ida.	Pittman, Nev.	Foreign Affairs	Porter, Pa.	McReynolds, Tenn.
Judiciary	Norris, Neb.	Ashurst, Ariz.	Judiciary	Graham, Pa.	Sumners, Tex.
Military Affairs	Reed, Pa.	Sheppard, Tex.	Military Affairs	Morin, Pa.	McSwain, S.C.
Naval Affairs	Hale, Me.	Trammell, Fla.	Naval Affairs	Butler, Pa.	Vinson, Ga.
Post Offices and Post Roads	Moses, N.H.	McKellar, Tenn.	Post Offices and Post Roads	Griest, Pa.	Mead, N.Y.
Rules	Curtis, Kan.	Copeland, N.Y.	Rules	Snell, N.Y.	Pou, N.C.

Senate for periods ranging from seven to thirty years. Hence the surprising preponderance of Western chairmen in that Congress was in large measure due to the loyalty of small-state constituencies that by re-electing their Senators enabled them to 'qualify' for this form of leadership under the 'seniority rule.'

Even with a shift in party control from one Congress to another there is often shown a striking tendency for chairmanships to remain with small-state Senators, since they have become ranking members. Thus, at the beginning of the Seventy-Third Congress the chairmanship of the Committee on the Judiciary passed from Nebraska to Arizona; of Banking and Currency, from North Dakota to Florida; of Foreign Relations, from Idaho to Nevada. As a result of the almost perfunctory original assignment of new Senators to committees, and of the application of the 'seniority rule' as modified by casualties natural or political, the residual personnel of a committee at a given time may seem strangely out of accord with its field of investigation and action. Thus, in 1933, the Committee on Commerce had among its twenty-one members only two from states of outstanding commercial interests; a similar situation was noticeable in the Committee on Banking and Currency; upon the Committee on Foreign Relations scant recognition was secured for large states of great industrial and commercial interests leading to intimate international contacts; its chairman was from Nevada, two members including the ranking member were from Idaho, two from Indiana, and the majority of the others from far-inland states where foreign relations have seemed to be of comparatively remote interest.<sup>1</sup>

Of the chairmanships of the largest thirteen Senate committees in 1934 not one fell to a state of the region east of the Mississippi and

<sup>1</sup> On his return from a Washington conference on the funding of the British war debt, to a throng of press men on the pier the Chancellor of the Exchequer, Mr. Stanley Baldwin, was reported to have said — with what the *London Times* called 'brutal frankness':

If you look at the Senate you will find the majority come from the agricultural and pastoral communities and they do not realize the meaning of any international debt. The bulk of the people of America have no acquaintance with international trade. Great Britain lives on international trade. The people in the West of America merely sell their wheat, hogs, and other produce and take no further interest in international trade. They are very much in the same frame of mind as we used to be about reparations, when a large number of people here thought Germany would send bags of gold every Saturday night. A great many people in America think all we have to do is to send the money over.

(*Boston Herald*, Jan. 27, 1923.) This report gave rise to some angry debate in the Senate. On motion of one of the American Debt Commissioners, at the request of the British Embassy there was inserted in the *Congressional Record* a statement disavowing the misconstructions that had been placed upon Mr. Baldwin's informal remarks. Feb. 14, 1923, p. 3630.

north of Mason and Dixon's Line, and only one to any of the twelve states of largest population in the Union.

If comparison be made between the chairmen of ten major committees of the Senate and of the House in the Seventy-First and Seventy-Third Congresses (1928 and 1933), it is to be observed that in each branch of Congress and under the régime of either political party these important positions go to men of advanced years and of long-continued congressional service. The average age of the Senate chairmen was sixty-three in 1928 and sixty-two in 1933; among the House chairmen the average age fell from sixty-six in 1928 to fifty-six in 1933.

In 1928 four of the Senate chairmen and in 1933 five of them had seen service in the House ranging from four to seventeen years, so that in 'congressional service' the Senate chairmen in 1928 had averaged nineteen years and in 1933 twenty-two years. But the House chairmen also had reached their posts only after long apprenticeship, averaging twenty years' service in Congress in 1928 and eighteen in 1933.

The differences in geographical distribution are more significant. In 1925, in a Senate under nominal Republican control the allotment of chairmanships had already shifted away from the Northeastern States. Only two went to New England and one to Pennsylvania. All the rest were from west of the Mississippi — from Kansas and Nebraska, from Utah, Idaho and Wyoming, and from Washington and Oregon. On the other hand, in 1933, when for the first time in many years a decisive majority conferred definite responsibility upon the Democrats, eight of the chairmanships went to the South, one to New York and one to Nevada. In the House under Republican control in 1928, five of the ten chairmanships went to Pennsylvania and two to New York. Outside of this northeast corner of the United States one chairmanship went to Illinois, one to Iowa, and one to Oregon. In 1933, the Democrats made a not less sectional distribution of the chairmanships: New York received one chairmanship. The other nine all went to Southern States — four of them to Texas.

## FROM WHAT PROFESSIONS ARE SENATORS DRAWN?

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The representative assembly should be an exact portrait, in miniature, of the people at large.... Equal interests among the people should have equal interests in the representative body.<sup>1</sup>

So wrote John Adams in 1776. But four years later this political theorist wrought few traces of this ideal into the constitution of Massachusetts. In the *Federalist* Hamilton declared: 'The idea of an actual representation of all classes of the people, by persons of each class, is altogether visionary.' He argued that, 'where the votes of the people are free, the representative body... will be composed of landholders ("middling farmers"), merchants, and men of the learned professions.... Artisans and manufacturers will commonly be disposed to bestow their votes upon merchants and those whom they recommend.... With regard to the learned professions, little need be observed; they form no distinct interest in society.'<sup>2</sup>

The personnel of Congress in the present century is widely in contrast with this brilliant lawyer's forecast. In an analysis of the personnel of the Sixty-Fourth Congress (1916) an eminent statistician showed that in the joint membership of House and Senate lawyers constituted fifty-eight per cent, whereas the legal profession in the United States numbered less than one-half of one per cent of the gainfully employed males twenty-one years of age and over; though farmers comprised thirty per cent of such males, in the membership of Congress they secured but three per cent; business men (eleven per cent of the gainfully employed) had ten per cent in Congress, and journalists (one per cent of the gainfully employed) had six per cent in Congress.<sup>3</sup>

### HEAVY PREPONDERANCE OF LAWYERS IN SENATE

As to the professional or occupational groups from which Senators are drawn, the most striking fact is the heavy preponderance of

<sup>1</sup> *Writings*, IV, 205.

<sup>2</sup> No. 35.

<sup>3</sup> 'Our Misrepresentative Congress — With too Many Lawyers, and Not Enough Farmers and Other Folks,' by William B. Bailey, *Independent*, July 24, 1916.

lawyers — probably larger than in any other national legislative body. Since the beginning of the present century more than two-thirds of the Senators have been members of the bar, and a large majority of them were in active legal practice at the time when they entered the Senate. In the century and more when Senators were elected by state legislatures, often largely made up of lawyers, it was natural that members of their own profession should be their choice for seats in the upper branch of Congress. But since Senators began to be elected by direct vote of the people, the percentage of lawyer-Senators has largely increased. In 1933 they constituted seventy per cent. Of the newly elected Senators who took the oath March 4, 1933, all but two were lawyers. The distribution of lawyer-Senators varies greatly in the different sections. In only one group — the Senators from the Middle-Atlantic States, New York, New Jersey, and Pennsylvania — were the lawyers in minority. On the other hand, all the Senators from the Pacific Coast States were lawyers, and so were all the Senators from the eight South Central States with the exception of one — the widow of a lawyer-Senator!

The extraordinary preponderance of lawyers, both in the Senate and in the House (Table V), as compared with the number of members drawn from business or agriculture, the two most characteristic and numerous American 'callings,' presents a startling contrast to the representation to be found in either branch of the British Parliament. The problems of twentieth-century lawmaking for the most part are fundamentally social and economic. By nature, training, or practice lawyers have no special competence for the analysis and solution of such problems. In fact, acute students of the sciences of government and of legislation have been highly critical of rank-and-file lawyers as lawmakers.

It is true that the legal profession is more generally representative than any other in this one sense, that lawyers are brought into professional contacts with all classes in the community. But these contacts are mainly in the application of the law and precedents as they now stand. In his *Elements of Politics*, Henry Sidgwick adduces cogent reasons for his judgment that 'it does not seem desirable to entrust the substantial work of legislation entirely — or even mainly — to lawyers alone.'

The deductive operation of applying complicated general rules accurately and faithfully to particular cases is very different from the inductive operation of collecting, comparing, estimating the good and

TABLE V. SENATORS' AND REPRESENTATIVES' OCCUPATIONS \*

Occupation	SEVENTY-THIRD CONGRESS 1933-34				SEVENTY-FOURTH CON- GRESS, 1935-36			
	SENATE 96		HOUSE 435		SENATE 96		HOUSE 435	
	Num- ber	Per cent	Num- ber	Per cent	Num- ber	Per cent	Num- ber	Per cent
Law	68	70.8	246	56.6	64	66.7	272	62.5
Business	10	10.4	86	19.7	7	7.4	82	18.9
Journalism	3	3.1	7	1.6	3	3.1	4	0.9
Editing; publishing	3	3.1	6	1.4	5	5.2	11	2.5
Farming	4	4.2	20	4.6	7	7.3	13	3.0
Teacher	2	2.1	10	2.3	1	1.0	11	2.5
Medicine	1	1.0	5	1.2	1	1.0	4	0.9
Dentistry	1	1.0	3	0.7	1	1.0	4	0.9
Steel worker	1	1.0						
Unknown	3	3.1	25	5.7	5	5.2	22	5.1
Miscellaneous			13	3.0			11	2.5

\* These statistics are taken from Bulletins of the Legislative Reference Service of the Library of Congress: *Professions of Members of the 73d and 74th Congresses*.

All the women members of Senate and House are here classified as 'Occupation Unknown.' Most of the data have apparently been derived almost exclusively from the autobiographical sketches in the *Congressional Directory*, which are sometimes very scanty. A Senator who there confines his sketch to the statement of his home address, and the self-characterization, 'Theodore Roosevelt, Republican,' is here further classified as a 'farmer.' Another Senator, whose autobiographical sketch adds to his home city address only the items 'Democrat, unmarried,' is here classified under 'Business.' The 'Miscellaneous' group in the House of the 73d Congress includes a very varied list of thirteen, more than half of them in some field of engineering.

bad consequences of actual laws, and considering the consequences of proposed or possible measures.... Persons, therefore, may be highly skilled by nature and practice for the *application* of law, which is the habitual intellectual work of the judge, without being qualified for the *modification* of law, which is the proper work of the legislator....

Hence, however desirable it may be to give leading lawyers a large and responsible share in the work of constructing laws, they are commonly more qualified to be *builders* than *architects* in this work.

In quoting these opinions of the eminent English publicist, our most erudite student of the legislative branch of government, Robert Luce, with the background of many years of effective service in Congress, comments:

Lawyers are liable to be poor lawmakers because their mental habit is backward-looking. Their whole training has taught them ever to rely on precedents. They worship the past. This has its advantages, but among them is not a facility for meeting present needs and anticipating tomorrow.<sup>1</sup>

<sup>1</sup> *Legislative Assemblies*, 335.

But Mr. Luce sets forth clearly certain capacities, developed by the lawyer's training, which will promise him the chance for leadership. From the very beginning his training should be developing in him precision in thought and language, and the ability to speak in public with self-possession, clarity, and persuasiveness. In his practice his acquaintance becomes extended and diversified. The records show that the largest group of lawyer-Senators in the Senate of the Seventy-Third Congress — eighteen out of its ninety-six members — got their early experience in the public service in the office of city or county prosecuting attorney.<sup>1</sup> For a young man with a spark of political ambition no other office presents such an exceptional opportunity to get his name dramatically before the public. Not a few of them, in House or Senate, leap to every opportunity to display the inquisitorial talents developed in the county courthouse at home. No one will deny that it is desirable — as Mr. Sidgwick says — 'to give to leading lawyers a large and responsible share in the work of constructing laws.' In the years since the World War there have been enacted by Congress a long series of statutes regulating commerce, manufacturing, and agriculture, in the attempt to adjust the law to the needs of a new day. Many of these laws have proved to be ill-designed, inconsistent, and needing prompt amendment or repeal. These bills have all been revised and reported by some Senate committees, two-thirds of whose members were probably lawyers of varying degrees of leadership in the law. Only a small minority of their members were from any other calling. Might not the results have proved more enlightened and enduring if a larger proportion of the membership on those committees had been men who had become recognized leaders in their several lines of enterprise by actually carrying responsibilities, the chances of success or failure, in coping with the human and the physical factors involved?

For example: In the days when the 'Farm Bloc' was organized, none of its most active members in the Senate was a farmer. Most of them were lawyers. 'Although brought forth under Republican auspices, none of the real dirt farmers of the Republican side of the Senate was invited to share in the formation, or in the later councils of the bloc.'<sup>2</sup>

#### The Committee on Agriculture and Forestry in the Seventy-Fourth

<sup>1</sup> John B. Mason, 'A Study of the Legal Education and Training of Lawyers in the 73d Congress,' *The Bar Examiner*, Sept., 1934.

<sup>2</sup> George H. Moses, 'The Agricultural Bloc: Its Peril,' *Forum*, Dec., 1921.

Congress (1936) consisted of thirteen lawyers, one lawyer's widow, one journalist, one editor-officeholder, one dentist, one well-driller, one organizer of a 'cotton association,' and one farmer. Obviously a committee of this personnel cannot draw upon its own membership for any great store of intimate knowledge gained from practical personal experience in grappling with the hazards, physical and financial, that constitute the 'farm problem.'

#### PERSONNEL OF PARLIAMENT MORE WIDELY REPRESENTATIVE

To English observers it is a matter of constant surprise that so few men of leadership in trade and industry have seats in Congress. 'Britain uses her business brains.'<sup>1</sup> In England young men are trained both for business and for public service, and business and statesmanship are not regarded as rivals, but as allies. Many of her greatest Prime Ministers have been leaders in mining, manufacturing, or commerce.<sup>2</sup> Almost every line of industry is represented in both Houses of Parliament. Thus, in the House of Commons under Premier Stanley Baldwin (1924), out of a membership of about seven hundred there were ninety men of legal training, though the major activity of many of these had been in production or in distributive commerce. But that House also contained about one hundred trade-unionists, representing from the side of labor a great variety of industries. From the standpoint of ownership or of management representation was not less widely diversified. The personnel of that House of Commons was thus classified by one of its members:<sup>3</sup>

#### PERSONNEL OF HOUSE OF COMMONS, 1924

Lawyers	90	Cotton kings	8
Trade-unionists	100	Coal	6
Bankers, brokers, insurance	22	Metal, mining and engineering	
Brewers	5	group	40
Shipowners	21	Miscellaneous businesses and	
Railway magnates	9	professions	76

<sup>1</sup> Under this title, P. W. Wilson, a former member of Parliament, discusses these contrasts, in an article from which the accompanying figures and comment have been directly drawn. *The Nation's Business* (Nov., 1924), 16-17.

<sup>2</sup> Sir Robert Peel was a cotton manufacturer and calico printer; Campbell-Bannerman derived his wealth from a Glasgow dry-goods house; Stanley Baldwin's interests were in iron and coal; Bonar Law was trained as a shipowner.

<sup>3</sup> Commenting on the personnel of the House of Commons elected in December, 1923, Professor Lindsay Rogers wrote: 'It is clear that capital and labor are sharply represented in Parliament, but instead of clear-cut divisions, the American Congress shows only *nuances*.' Facing the scores of trade-unionists and other working-class members were some 250 members closely associated by family ties with the aristocracy — large

The business member of Parliament, in debating and voting, tests each legislative proposal by his own practical experience. Speaking as an expert, he supplies the facts to which Parliament is entitled. He is not expected to be impartial, but 'no business member, who values his career, would wittingly mislead the members of the House.' In England it is the belief that 'after all, it is more wholesome for "business," and especially for "big business," thus to speak, frankly and fairly, from the floor of the House, than for such interests to be kept at arm's length in the lobbies.'

Attendance upon the Senate interferes far more seriously with the active conduct of a business than does membership in the House of Commons. Some men who have gained fortune and power in large business are then ambitious for the new power and prestige which may be gained in the Senate. Such Senators have rarely attained distinction on the floor, but some of them have rendered invaluable service in the committee room. For the most part, America's leading business men, unfortunately, have been too engrossed in their own profit-seeking enterprises to be willing to go into congressional service, preferring there to be 'represented by counsel.'

landowners and company directors representing capital estimated at £2,000,000,000. Another contrast which he stressed was that, whereas American legislators represent the districts in which they reside, a large majority of the House of Commons is national rather than local in character. In the election of that year 416 local candidates were rejected, although nearly half of them had had local government experience in the divisions which they contested. 'Where Statesmen Come From,' *The New Republic*, July 30, 1924.

Writing in 1912, H. G. Wells passed this comment: 'Steadily with the ascendancy of the House of Commons, the barristers have ousted other types of men from political power.... We are governed now not so much by the people for the people as by the barristers for the barristers. They set the tone of political life — a tone as hopelessly discordant with our very great and urgent social needs as one could well imagine.... A distinguished and active fruitlessness, leaving the world at last as he found it, is the political barrister's ideal career.' (*Social Forces in England and America*, 59.) At the time of this gloomy appraisal of the tone given to English public life by the barristers, probably less than one-sixth of the members of the House of Commons were of that profession, whereas in the United States at this writing seventy per cent of the Senators are members of the bar, and for years in Congress the lawyers have exceeded three-fifths of its membership.

### THE SENATE'S QUALITY

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There has never been a time when the Senate was not the target of severe criticism. The very nature of its most distinctive functions inevitably arouses irritation. It was designed for the express purpose of applying restraints: no House bill was to become a law till it had run the gantlet of Senate revision and amendment; without its advice and consent the President was to make no treaty, appoint no ambassador or consul, and name no department head or judge; except by the verdict of the Senate in an impeachment trial, neither the President nor any federal judge was to be removed from office. Every one of these tasks assigned to the Senate implies the exercise of deliberate and independent judgment, which may at any time set at naught the cherished purposes of the President or of the House.<sup>1</sup> In fact, before the end of the Senate's very first session the House had become restive at the Senate's delays and dissents; President Washington had caustically reproached the Senate for its failure to confirm what he deemed a most fitting and desirable nomination, and had shown great irritation at its unwillingness to give immediate and unqualified consent to the ratifying of a treaty.<sup>2</sup> In the first great impeachment trial the Senate's verdict for the defendant, though approved by the historian, infuriated President Jefferson, and caused such resentment in the House that immediately constitutional amendments were proposed providing that the President might remove federal judges on joint address of both Houses of Congress and that the legislature of a state might at any time recall its Senators.<sup>3</sup>

When was the 'Golden Age' of the Senate? Certainly it was not in the First Congress, if we are to trust the testimony of Maclay, whose *Journal* records, day by day, with the utmost frankness the impressions which his colleagues and their methods were making upon this

<sup>1</sup> Ex-Senator George Wharton Pepper, *Forum* (Dec., 1925), 863-71.

<sup>2</sup> Pages 64-66.

<sup>3</sup> Both of these resolutions, by a party vote, were referred to the next Congress. Albert J. Beveridge, *John Marshall*, III, 220-21; 852.

suspicious and 'mean-spirited' democrat. Six months had not passed when in his *Journal* he freed his mind thus:

With the Senate I am certainly disgusted. I came here expecting every man to act the part of a god; that the most delicate honor, the most exalted wisdom, the most refined generosity, was to govern every act and be seen in every deed. What must my feelings be in finding rough and rude manners, glaring folly, and the basest selfishness apparent in almost every public transaction. . . . Our government is a mere system of jockeying opinions. 'Vote this way for me, and I will vote that way for you.'<sup>1</sup>

Making due allowance for Maclay's political bias and for his readiness to impute unworthy motives, the historian finds abundant confirmatory evidence that behind the Chamber's closed doors Senators — some of whom have been venerated as 'Founding Fathers' — were 'jockeying' and voting upon the locating of the 'permanent residence,' the assumption of the state debts, and other questions of national policy in the closest accordance with their own private and class interests.<sup>2</sup>

The period which most enhanced the prestige of the Senate at home and abroad was that during which Webster, Calhoun, and Clay were the leaders in the great debates over states' rights, slavery, and the relative power of President and Senate. But in the opinion of Senator Hoar, writing from a retrospect of twenty-five years, the Senate was more powerful in the late seventies than ever before or since, not because of the pre-eminence of leaders of the rank of the 'Great Triumvirate' of the decade before 1850, but because the average excellence was very high. He listed a score or more of members of mark at the time when he entered the Senate (1877), of whom he could say: 'When they went to the White House, it was to give advice, not to receive it.'<sup>3</sup> But in the last decade of the nineteenth century there became prevalent the belief that state legislatures were being manipulated by various 'interests' to elect men whose great abilities could thus be enlisted in the Senate in the service of those who had sponsored their choice.<sup>4</sup>

<sup>1</sup> *Journal*, 143, Aug. 31, 1789.

<sup>2</sup> Charles A. Beard, *Economic Interpretation of the Constitution*. Maclay, *Journal*, 145-47; 152-55; 311-13; 322-29.

<sup>3</sup> *Autobiography*, II, 52 ff.

<sup>4</sup> The extent to which the Senate of that period was a subject of serious discussion is indicated by the following titles of articles by some of the most eminent writers of the day:

George F. Hoar, 'Has the Senate Degenerated?' *Forum*, 1897.

## THE MOVEMENT TO DEMOCRATIZE THE SENATE

As early as 1896, in a formal report a Senate committee deplored the fact that 'the tendency of public opinion is to disparage and depreciate its [the Senate's] usefulness, its integrity, its power.'<sup>1</sup> It chanced that in 1910 upon the same day the press announced that after thirty years of service in the Senate both Hale and Aldrich had decided not to stand for re-election. By that time the ratification of a popular-election amendment was clearly foreseen. There was much editorial comment upon the 'vanishing type' represented by these two powerful Senators. They were men of great ability — one principally an obstructionist, the other a constructionist — yet for the most part using their ability with rather contemptuous disdain of common folk's concerns, but with keen attention to the wants of 'big business.'<sup>2</sup>

So far as its effects upon the state legislatures are concerned, the Seventeenth Amendment did bring much-needed reforms: it put an end to the blurring of issues in the election of members of the legislatures, and to the prolonged deadlocks which often distracted and delayed, if they did not actually prevent, the doing of the essential tasks of lawmaking and providing the means for carrying on the state governments.<sup>3</sup> But in some other respects, if one may judge by the comments of many Senators, the success of this 'epoch-making reform' has not been so obvious.

In debating a resolution to amend the Constitution so as to give to the people of the several states the power by their direct vote to ratify or to reject future amendments, the Senators, some ten years after the adoption of the popular-election amendment, found themselves led into a discussion of its success or failure. A delicate question, that, for the Senate Chamber!<sup>4</sup> Said Fess: 'Whether or not we have elevated

H. E. V. Holst, 'Ought the Senate to be Abolished?' *Monist*, 1894; 'Shall the Senate Rule the Republic?' *Forum*, 1893.

A. Maurice Low, 'The Oligarchy of the Senate.' *North American Review*, 1902; 'The Usurped Powers of the Senate.' *American Political Science Review*, 1906.

C. R. Miller, 'Has the Senate Degenerated?' *Forum*, 1897.

Harry Loomis Nelson, 'The Overshadowing Senate.' *Century*, 1903.

Samuel W. McCall, 'The Power of the Senate.' *Atlantic Monthly*, 1903.

Goldwin Smith, 'Has the United States Senate Decayed?' *Saturday Review*, 1896.

<sup>1</sup> S. Rept. 530, 54th Cong., 1st sess.

<sup>2</sup> For intimate characterization of Aldrich and his attitude and methods, see D. S. Barry, in *The New Outlook* (Feb., 1933), 40.

<sup>3</sup> For discussion of many deadlocks, of an absolutely aborted legislature, and of the atmosphere of bribery and manipulation which was widely prevalent in the legislative election of Senators, see G. H. Haynes, *Election of Senators*, *passim*.

<sup>4</sup> *Cong. Rec.*, March 15, 1924.

the standard of this body by the change in the manner of the election of Senators, is still an open question. . . . I have come to have serious doubts as to whether or not the change has been beneficial.' Reed (Pennsylvania) gave as one reason 'why the Seventeenth Amendment is not a success' the fact that 'so small a proportion of the citizenry takes advantage of the opportunities that it gives. . . . I think on the whole the Amendment has not worked anything like as well as we had hoped.'<sup>1</sup> Robinson (Arkansas), later Democratic majority leader in the Senate, declared: 'The Seventeenth Amendment probably accomplished no permanent improvement in the national system of lawmaking.'<sup>2</sup>

There can be no question that in the years since the ratification of the Seventeenth Amendment the prestige of the Senate has suffered serious decline. To say this is by no means equivalent to saying that the Senate has deteriorated. But the mere fact of the lessened esteem and confidence in which the Senate has come to be held is greatly to be deplored. There has been no period in our history when there was more need for the cool and courageous exercise of the Senate's distinctive powers of revision and amendment, of confirmation and ratification, and of investigation, than in the years since the people took into their own hands the direct election of Senators.

The Senate is restive under criticism, especially when it comes from those that are of its own household, whether members or officers.<sup>3</sup> Senators who in the above debate expressed their doubts as to whether the standard of the Senate had been raised by popular election at once laid themselves open to reproach and derision by their colleagues.

Most eloquent and aggressive in defense of the Senate against adverse criticism has been Senator David I. Walsh. In his opinion 'the United States Senate is the last citadel of minority rights, and the protector of weaker states.' Raising the question, 'Has the Senate deteriorated?' he replied:

Yes, if the measure by which you judge the value and usefulness of a legislative body is the worldly possessions of its members — or if you estimate a legislative body by its culture and social refinements — or by the personal record of its members as attorneys for or representatives of large business interests before entering public life.

<sup>1</sup> *Cong. Rec.*, March 15, 1924. A few years later, Reed discovered other reasons, and stated them with great pungency (*infra*, 1079).

<sup>2</sup> Address at Goodwyn Institute, Memphis, Tenn., Nov. 11, 1926. In an address at Rochester, N.H., Jan. 3, 1927, Moses declared: 'The character of the personnel of the Senate fails to measure up to the standard we knew a quarter of a century ago.'

<sup>3</sup> Criticism by the Sergeant-at-Arms led to his expulsion (p. 264, n. 3).

In his opinion the only test which it is fair to apply in determining whether the Senate is or is not deteriorating is 'the moral seriousness of its members — that moral seriousness which includes industry, integrity, and a serious consciousness of the grave responsibilities of public service.' The real reason 'for the propaganda against the Senate . . . for the efforts to spread the delusion that its personnel has deteriorated since the Senators have been directly elected by the people,' he finds is 'the presence in that body of a new, substantial, aggressive, independent, and progressive type and spirit.'

The Senate has defects. Let us correct them with sympathetic hands. The Senate has imperfections. Let us purge it of them, and the Senate will be a stronger bulwark than ever of our liberties. Let us stop abusing it, because it is not controlled as well by political bosses and financial groups as formerly. In any event, all who sit here have been sent here by the American people. An indictment of the Senate is an indictment of the whole people.<sup>1</sup>

After eight years of close observation of the Senate, at first from the chair of its presiding officer and later from the White House, ex-President Coolidge wrote: 'While I do not share altogether the prevailing lack of esteem in which the Senate is held, I fully realize the need of sending to that Chamber men of ability, character, and training.' That the Senate is held in a 'prevailing lack of esteem' is a fact as unfortunate as it is indisputable. It is a fact to be frankly faced, and not to be put aside by oratorical denial of the fact, nor by denunciation of those who state it. Instead of alleging or denying that the Senate has 'deteriorated,' it is better worth while to seek some of the causes of that 'lack of esteem,' and some of the conditions which are making it difficult to send to the Senate men of that 'moral seriousness' and of 'the ability, character, and training' recognized by Senator Walsh and ex-President Coolidge alike as highly essential for eminent service in the Senate.

<sup>1</sup> Speech in the Senate, 'defending the Congress, and in reply to propaganda alleging that the Senate had deteriorated,' June 4, 1924, *Cong. Rec.*, 10451-53. A speech of similar tenor was delivered over the radio, May 24, 1929. *Ibid.*, 1900-03, May 25, 1929.

In the opinion of the present writer, there is great unfairness in the above statements, though many other comments in Walsh's encomiums upon the Senate are thoroughly justified. Candid analysis and criticism are not to be characterized as 'propaganda against the Senate,' nor as 'efforts to spread a delusion' as to its personnel. Most unfair is the implication that present-day criticism (which is not to be confused with 'abuse') has become widespread 'because it [the Senate] is not controlled as well by political bosses and financial groups as formerly.' In every community there abound serious-minded and public-spirited critics of the Senate who are just as hostile to its being 'controlled by political bosses and financial groups' as any Senator may be. What they deplore is that there has not developed more *self-control* and independence within the Senate itself.

In the first place, as Woodrow Wilson wrote many years ago:

The Senate is just what the mode of its election and the conditions of public life in this country make it. . . .

The Senate is in fact, of course, nothing more than a part, though a considerable part, of the public service, and if the general conditions of that service be such as to starve statesmen and foster demagogues, the Senate itself will be full of the latter kind, simply because there are no others available. There cannot be a separate breed of public men reared specially for the Senate. It contains the most perfect product of our politics, whatever that product may be.

In the second place, the Senator's tasks in recent years have become much more difficult and complicated. The problems with which the Senate now deals are mainly economic; in a world of rapid change their solution is increasingly becoming involved in international readjustments.

Furthermore, the Senator's work must now be done amid incessant distractions necessary in maintaining satisfactory contacts with his constituents, that his days may be long in the seat which they gave him. No intelligent man who had actual knowledge of the election of Senators by state legislatures would wish to see a return to a method which proved itself subject to the grave abuses which led to its abandonment. Popular election has eliminated some of the worst features of the earlier method, but it has developed serious defects of its own which need frank recognition and correction. The Senate has shown no great zeal for the correcting of these defects 'with sympathetic hands,' though Senator Walsh is to be credited with initiating important legislation directed to that end.<sup>1</sup> Most of these defects are associated with the direct primary which has revealed ineffective and dangerous possibilities hardly suspected when it was being heralded as the panacea for democracy's ills.

In theory the direct primary and popular election of Senators are supposed to exemplify pure democracy: We, the alert, intelligent, and incorruptible voters, sign nomination papers for those whom we — from our own personal knowledge or from careful study of reliable information — believe to be best qualified for senatorial service. In the primary there emerge the few candidates of most convincing qualifications. In the election, 'majority (?) rules,' and 'the voice of the People is the voice of God.' Unfortunately, in actual practice the procedure and the result are often 'quite other.'

A Senator's most valuable and statesmanlike work is usually

<sup>1</sup> The 'Corrupt Practices Act' of 1925 (pp. 159–60).

entirely undramatic. Henry Clay declared that he ‘did infinitely more in his room than he did in the Senate Chamber,’ for in the quiet of his own room ‘he was at work night and day, either reading, digesting, or preparing matters in connection with his public duties.’ But the public cannot properly appraise the value of this preparatory work in the Senator’s own study, nor his diligence and effectiveness in the committee room where most of the analytical and discriminating work of lawmaking is done. For essential but routine service such as this, the would-be candidate is not likely to have given evidence of special qualifications. That a man has a nimble tongue and can make a stirring stump speech, that he has made a sensational ‘success’ as a prosecuting attorney, that he has attained nation-wide recognition or notoriety as a state governor — any or all of these ‘records’ may afford no proof of his fitness for eminent service in the Senate. Of the men, chosen by direct primary and elected by popular vote, who in recent years have been most responsible for ‘the prevailing lack of esteem in which the Senate is held,’ several had loomed large in the headlines as prosecuting attorneys or governors.

#### SOME COSTS OF THE DIRECT PRIMARY AND POPULAR ELECTION OF SENATORS

##### *The Money Cost*

Popular election of Senators has proved immensely more costly than was anticipated by either its advocates or opponents. In the first place, the literal ‘cost’ in the amount of money actually expended in senatorial primary and election campaigns has increased enormously.<sup>1</sup> To the resolution which declared Newberry ‘duly elected’ (January 12, 1922) his supporters tried to save their self-respect by adding a paragraph which severely condemned ‘such excessive expenditures in behalf of a candidate . . . as being contrary to sound public policy, harmful to the honor and dignity of the Senate and dangerous to the perpetuity of a free government.’<sup>2</sup>

The ‘excessive sums’ thus stigmatized aggregated only about \$195,000; and it was conceded that most, if not all, of the objects of expenditure had been legitimate, though in the aggregate the outlay

<sup>1</sup> ‘The direct primary and popular election of Senators have doubled and tripled the length of the campaign, and tripled and quadrupled the cost and the scandals connected with electing Senators.’

<sup>2</sup> See for a detailed and passionate defense of Newberry, *Henry Ford vs. Truman H. Newberry*, by Spencer Ervin (1935), ‘A Study in American Politics, Legislation, and Justice.’

exceeded the maximum prescribed by a Michigan law of doubtful constitutionality. But in 1926, an aggregate of nearly \$1,000,000 was spent in Illinois and more than \$2,500,000 in Pennsylvania to win senatorial nominations.<sup>1</sup> In 1930, it was alleged that in Pennsylvania \$1,000,000 was spent in backing the Brown-Davis (Governor-Senator) ticket in the primary contest; and in that same year Ruth Hanna McCormick exhibited before a Senate investigating committee account books and vouchers for expenditures of more than \$300,000, contributed by herself and her immediate family, for legitimate organization and publicity work for the winning of the Republican nomination for Senator from Illinois.

If the direct primary is ultimately to prove itself a genuinely democratic and intelligent method of nominating candidates, the rank and file of the voters must be aroused to the issue at stake, and must have easy access to the information that will enable them, each for himself, to make a deliberate choice of the nominee whose judgment and leadership he believes are most needed by the country in the high office of Senator of the United States. 'This was no ordinary campaign,' was Newberry's contention. Obviously, the expenditure of thousands of dollars would not secure for a senatorial candidate in Michigan the 'publicity' which Henry Ford, the Democratic aspirant for the seat, already had throughout the state. Mrs. McCormick insisted that there was nothing reprehensible in her expenditure of more than a quarter of a million dollars of her own money in setting up county organizations and in providing speakers and campaign 'literature' to carry her candidacy to millions of Illinois Republican voters in a state-wide contest against the organization already in the field supporting the sitting Senator in his campaign for re-election.<sup>2</sup>

Granted that such enormous expenditures are 'contrary to sound

<sup>1</sup> Pages 541-44.

<sup>2</sup> In 1932, if a would-be candidate for the Senate had wished to send merely one printed postcard to each potential supporter of the party which in his state led in the vote for President, those cards alone — allowing nothing for printing or addressing — would have cost as follows in these six states:

New York	\$25,329	Delaware	\$635
Pennsylvania	14,535	Wyoming	543
Illinois	18,823	Nevada	287

'In Pennsylvania a single well-written form letter, addressed and mailed to each Republican voter, could cost \$150,000.' (G. W. Pepper, *In the Senate*, 57.) As an indication of the difficulty in prescribing a maximum limit of expenditures in a primary campaign, compare the enormous expenditures in the 1926 primaries in Pennsylvania with the following expenditures reported by the Senators who won nominations that same year in several other states: Jones (Wash.), \$245, Steiwer (Ore.), \$651.18, Walsh (Mass.), \$0.00, Nye (N.D.), \$362, Curtis (Kan.), \$110. Each of these candidates won in the ensuing election.

public policy,' particularly in their tendency to give a most unfair advantage to office-seekers who have or can secure large wealth to back their candidacies, it is very difficult — as was indicated in the briefs and Supreme Court Justices' opinions in the Newberry case — to formulate logical and adequate restrictions as to the size of campaign contributions, or the sources from which they may be received, or the objects for which they may legally be expended. For example, the sums expended in 1926 in behalf of Vare's nomination and election were so huge as on their very face to seem to evidence corruption — of which the court records show there was a great deal. Yet it cost nearly twice as much per vote to re-elect Wheeler of Montana in 1928 as to elect Vare in 1926. The Vare cost was 54 cents per ballot. That it cost \$1.02 per ballot to send Wheeler back to the Senate suggested no scandal.<sup>1</sup> But it does emphasize the tremendous difference in the size and distribution of the electorate which must be canvassed in those two states by candidates for seats in the Senate.

In view of the difficulties in framing legislation for the regulation of campaign contributions and expenditures, the Nye committee reported that resort may have to be made to the Government's assumption of candidates' campaign expenses. Objections to such action are obvious. A less radical proposal deserves consideration. Oregon set the example in issuing an official educational campaign pamphlet printed and mailed to the voters by the Secretary of State. In this the sponsors for those seeking nomination, e.g., for a seat in the Senate (as for other offices), are allowed a uniform maximum amount of space in which to set forth the qualifications of the one whom they favor. In this form of publicity, at minimum expense, all the candidates, rich and poor, stand more nearly upon the same plane.<sup>2</sup>

<sup>1</sup> These figures were cited by Reed from the report of the Steiwer committee in the Vare case debate, in which Wheeler had most severely "denounced the Pennsylvania expenditures. Wheeler questioned the accuracy of the Montana figures, but acknowledged that the aggregate amount might have been expended in behalf of all the candidates upon the ticket. But Vare also protested that he should not be charged for the indistinguishable amount that was expended for the gubernatorial candidate on the Pennsylvania joint ticket. (*Cong. Rec.*, 82, Dec. 4, 1929.) Vare was present during this debate and declared that his personal expenditure in the campaign was \$71,000 — and all expended for letter-writing and advertising which is exempt and proper under the law. (See Cutting's comments, *ibid.*, 191.)

<sup>2</sup> *Preparation for a Primary Election in Oregon.*

As Oregon has gone further than other states in supplying the would-be candidates reasonably equal publicity opportunities, and in affording the voter the basis for making an intelligent choice between candidates for nomination, her procedure and its cost are matters of interest to all citizens interested in the 'reform of the primary.'

As preliminary to an approaching primary election in Oregon, a separate pamphlet is prepared for Republicans and for Democrats — these being the only parties that are qualified to nominate their candidates at a primary election. A candidate for nomina-

Since the adoption of election of Senators by the people, many a claimant's right to a seat in the Senate has been challenged because of excessive campaign expenditures in his behalf. In most of these cases the alleged illegal practices have been in connection with the primary campaign for the winning of the party nomination rather than in connection with the later campaign and balloting to determine the choice between the several nominees. The power of Congress to regulate expenditures in the primary campaign has been vigorously challenged on the ground that the Constitution's clause authorizing Congress at any time by law to 'make or alter such [state] regulations [of elections] except as to places of choosing Senators' could not apply to 'primaries,' inasmuch as they are instrumentalities of private organizations (political parties), and not genuine, office-filling 'elections.' The Supreme Court has not explicitly passed upon this discrimination.<sup>1</sup> But in their phraseology recent corrupt practices acts and resolutions creating Senate investigating committees have assumed that Congress has the power to regulate expenditures in primary campaigns. In his minority opinion in the Newberry case, Chief Justice White held that the theory that the primary is not an integral part of the election process was 'suicidal.' He cited passages from letters of several governors to the present writer. Thus, Governor Jeff Davis of Arkansas wrote (August 29, 1904):

The last state convention adopted a resolution that the candidate for the United States Senate receiving the highest number of votes in the primaries should be declared the choice of the Democratic Party for the United States Senate by the state convention, just as they declare the nominees of the party for state offices, and, of course, the legislature has no duty depending upon them but to cast their vote for the person declared the successful candidate by the state convention. This is absolutely equivalent to the election of the people. You see, this can happen in this state because the nominees of the Democratic Party are con-

tion for United States Senator is entitled to the use of not more than four pages in this official pamphlet, setting forth his qualifications. This statement may be signed by the candidate, or by his friends individually, or by a campaign committee.

The charge for inserting a statement varies with the office sought. For a candidate seeking nomination for membership in the state legislature the charge is \$10 a page; if he is seeking nomination for the office of governor or United States Senator, the charge is \$100 a page. Any person desiring to insert a statement in opposition to a particular candidate is entitled to the same amount of space, at the same rate.

The total cost of compiling, printing, and mailing the 485,000 pamphlets that were forwarded to the Oregon voters prior to the primary election of May 18, 1934, was \$11,153.07. Payments by candidates for space amounted to \$5540. The difference, \$5613.07, represents the cost to the state of furnishing the pamphlets — a small sum, if its expenditure results in a more intelligent choice of candidates.

The above information was supplied at the writer's request by Earl Snell, Secretary of State, October 3, 1934.

<sup>1</sup> For colloquy over this point between Reed (Penn.) and Borah, see p. 139.

sidered as elected, as our legislature consists of 135 members and only two are Republicans.<sup>1</sup>

#### *The Drain upon the Senator's Health and Efficiency*

A second heavy 'cost' of the direct primary is found in the drain upon the would-be candidate's strength. In the case of a Senator who is seeking re-election, this cost falls not only upon the campaigner, but also upon the public in the impairment of the Senator's service. In 1925, the death of a young Senator of great ability and high promise was attributed in part to exhaustion resulting from his state-wide canvass for renomination in one of the largest states of the Union. While a Senator is thus wearing himself out in an electioneering campaign, inevitably his service of the public in the Senate suffers great detriment. For many weeks at a time Senators are often thousands of miles from the Capitol, 'repairing their fences.'<sup>2</sup>

#### *The 'Travesty on the Notion of "Majority Rule"'*

The direct primary induces an absurd multiplication of candidacies, often of the most preposterous quality, yet throwing the whole campaign into turmoil and uncertainty, which may result in a grab-bag choice of Senator. This statement may be challenged as extravagant or hypercritical. No apology is offered for putting on record some specific instances.

After his failure to secure a seat in the Senate, first on appointment by the governor, and later by election that the Senate held to be invalid, Frank L. Smith sought 'vindication' by running for the office of Congressman-at-Large. He won nomination as a Republican, but trailed far behind a Democrat in the election. Professor Woody commented: 'The spectacle of a Frank L. Smith winning by a plurality from among 23 candidates as in the 1930 [Illinois] primary would be amusing were it not such a travesty on the notion of "majority rule."'<sup>3</sup>

<sup>1</sup> G. H. Haynes, *The Election of Senators*, 138 ff. In their autobiographical sketches in the *Congressional Directory* Senators often state the votes by which they have secured the nomination in the primary, but make no mention of the later votes by which they were legally elected.

In his exhaustive study, *Henry Ford vs. Truman H. Newberry* (1936), Spencer Ervin maintains that Congress should abstain from regulating primaries. (*Supra*, 143, n. 1.) The present writer cannot accept that conclusion.

<sup>2</sup> That a Senator may seek to salve his conscience by arranging for a 'general pair' during his weeks of absence is by no means an adequate excuse for failure to perform the duties called for by his oath of office (pp. 366 ff.; 1008).

<sup>3</sup> Many proposals have been made for the reform of the primary procedure. Informal 'harmony' conferences have been held shortly before the date set for the primary, in the hope of focusing attention upon the most outstanding 'possibilities,' and of bringing

A few days after the announcement of Vare's winning of the Republican nomination for Senator in the Pennsylvania primary of 1926, the effectiveness of the direct primary in securing from the voters an intelligently discriminating choice of candidates came under discussion in the Senate.

Senator Borah asked Senator David A. Reed:

Is it not a fact that Vare could not have been elected under any circumstances, if he had not been notoriously 'wet'?

Senator Reed replied:

The question of prohibition or anti-prohibition did obscure all other discussion in the state. We did our best to subordinate that question to its proper place in the scheme of things, but as far as I could discover a very large number of the voters of Pennsylvania did not care whether the man for whom they voted knew anything about foreign affairs, or about banking and currency, or about taxation and finance, or about military or naval affairs, or about railroads or about shipping. They just shut their eyes and voted for a 'wet' or a 'dry' — and as long as the voters of Pennsylvania continue to vote like a lot of dunderheads in that way, they deserve what they got!<sup>1</sup>

about the withdrawal of candidates who have no slightest prospect of winning the nomination. Thus, in Massachusetts (June, 1928) a Republican conference, attended by about 1200, was held in Boston for the purpose of 'suggesting' a candidate for the Senate to be considered by Republicans in selecting their candidate at the primary to be held three months later. To this conference there were presented the names of six aspirants — three of whom had strongly opposed the holding of this gathering. A motion to ballot for the endorsement of a candidate was defeated by a heavy vote. Two years later (July 30, 1930) a Democratic 'harmony meeting' for a similar purpose ended in wrangling, the ejection of delegates, fist-fights, and the calling-in of the police. Persuaded that such informal get-togethers fomented dissensions and rivalries instead of firing party loyalty, the voters of Massachusetts by initiative procedure enacted a law providing for pre-primary conventions. In practice, it brought slight improvement, and in 1937 the law was repealed.

In New York, Governor Charles Evans Hughes sponsored a proposal under which party committees, elected in regulated primaries, would have the right to designate candidates for the primary. The names thus proposed were to be printed in a block apart from other names, and were to be designated as the 'organization' ticket. The obvious intent was to increase party responsibility, but the proposal aroused no enthusiasm and failed of adoption. 'Straight organization men opposed it almost to a man, characteristically preferring power without responsibility, which they already had, to power linked with strict responsibility.' (P. Orman Ray, *Political Parties and Practical Politics*, 105.) In the third edition of this book is a comprehensive bibliography of 'The Direct Primary.'

The proposal that political parties 'be treated as quasi-governmental institutions to the extent at least of the government taking care of the actual legitimate cost of a campaign rather than encounter the evils of private financing,' put forward by Borah, Jan. 6, 1927, before the Committee of One Thousand for Law Observance and Enforcement, was in substance given approval in the Nye report from the Committee on Senatorial Expenditures, advocating federal control of primaries in the same manner as elections. For report and bill (S. 2316) see *Cong. Rec.*, 977-84, Dec. 21, 1931.

<sup>1</sup> *Cong. Rec.*, 9995, May 25, 1926. Pinchot had split the 'dry' vote, in running against Pepper, who was seeking renomination (p. 151, n. 1).

In the Massachusetts primary campaign of 1930, as in the Pennsylvania primary campaign of 1926, the repeal of the Eighteenth Amendment was the dominant and divisive issue. William M. Butler, the incumbent, early announced his candidacy for re-election, but postponed for a month making known his stand upon the liquor question. Meantime, there came into the field three other contestants for the Republican nomination. The real rival was a wealthy manufacturer, of large business experience, college-trained, and an ardent 'wet.' Another 'Republican' aspirant was an ex-prizefighter, keeper of a variety store at a summer resort. His only political asset seemed to consist in the fact that his name was 'William L. Butler.' Of course, it was inconceivable that he could be nominated, but it was morally certain that a good many votes would be lost to the incumbent because of confusion between the two 'Butlers.' He secured more than the necessary one thousand signatures, but a careless non-compliance with a technicality as to the residence-distribution of a very few of the nomination-petition signers eliminated this 'shadow' candidate from the contest.

There remained 'Bossy' Gillis, also somewhat of a 'bruiser,' whose boorish and brazen effrontery in a controversy with the city council over a license for his gasoline filling station had so tickled the fancy of irresponsible voters that they had made a joke of electing him mayor of Newburyport, the smallest city in the Commonwealth. Gillis entered the campaign as a 'wet' Republican aspirant for a seat in the United States Senate. So preposterous was his candidacy that a Senate committee seriously considered investigating the influences which had injected him into the campaign. Nevertheless, in that primary election Gillis received nearly 23,000 votes. Had less than a third of the votes thus childishly thrown away been cast for the strong 'wet' Republican, he would have been nominated, and would have stood a good chance of winning the election. In the same contest a man entered the race as an 'Independent' for nomination for the senatorship, with no hope of winning that prize, but in the belief that the signatures of more than a thousand voters upon his petition to have his name placed on the primary ballot would serve as a 'vindication' demonstration in his effort to secure readmission to the Massachusetts bar, from which he had been disbarred for filthy blackmailing. He easily secured over nineteen hundred signatures, but later withdrew from the contest.

In the 1930 primary campaign in Nebraska, where George W.

Norris, already veteran of ten years' service in the House and eighteen in the Senate, was a candidate for re-election, it suddenly developed that papers had been filed for placing on the primary ballot the name of 'George W. Norris of Broken Bow.' The 'surprise' candidate was found to be a grocer in a town of some twenty-seven hundred inhabitants. He never could have been thought of in connection with a seat in the Senate had it not been for the identity of his name with that of the 'insurgent' Republican whose frequent defection from Republican policies in the Senate, and whose campaigning and voting for La Follette in 1924 and for Smith in 1928 had caused bitter resentment in Republican ranks.

By order of the Nebraska Supreme Court, on the opportune technicality that some lists of signatures to his nomination petition, though mailed, had not been actually received within the time limit for filing, the name of this elusive 'George W. Norris of Broken Bow' was kept off the ballot. Otherwise, this shabby trick would have caused incalculable confusion in the election, with the possible defeat of one of the most experienced and influential members of the Senate. The Broken Bow grocer and Victor Seymour, the former manager of the Western headquarters of the Republican National Senatorial Campaign Committee, were brought to trial for perjury in testimony given before the Nye Committee. Norris and Seymour were both convicted, and paid one hundred dollars fines, and served jail sentences of three months.

The primary campaigns in the summer of 1936 yielded abundant illustrations of the multiplication of candidacies and other absurdities to which the direct primary is liable. For example, the Oklahoma primary ballots, used July 7, 1936, contained names of candidates as follows:<sup>1</sup>

	Democratic	Republican
<i>For national officers:</i>		
United States Senator (1)	8	8
Representative-at-Large (1)	16	12
Representative, 5th District (1)	22	5
<i>For state officers:</i>		
Corporation Commissioner (1)	10	15
State Senator (1)	4	2
State Representative (1)	9	3

<sup>1</sup> Nicknames seem to have been thought alluring to the voter, for candidates appeared under the following: Al, Ben, Bert, 3 Bills, Bob, Connie, Dave, 2 Eds, Hamp, 3 Jacks,

In many instances the returns showed votes scattered so widely over a range of candidates, two-thirds of whom had no substantial backing, that there could be little confidence that the resulting choice of the leaders to stand in the run-off primary, three weeks later, was little else than an accident. But the first primary did serve to clear the field of a vast number of 'impossibilities,' and led to a sharper focus of heedless voters' attention upon issues and men.

#### *The Lowering of the Dignity and Esteem of the Office*

Another heavy 'cost' which has increased in connection with the direct primary and the popular election of Senators is found in the vulgarizing of the candidates' campaign methods. Fearing that few votes would be won by a plain setting-forth of his own qualifications for doing a Senator's most essential but often wholly undramatic work, many an aspirant for nomination seeks to get publicity by all sorts of antics — on the stump, in the press, and 'on the air.' The historic Lincoln-Douglas debates gave a splendid illustration of what may be accomplished when two men of high ability and 'moral seriousness' face each other in the presence of their constituents and come to close grips in the discussion of the most vital questions of national policy. But present-day primary campaigning is largely a cheap bidding for notoriety, carried to the extreme when candidates with circus stunts and screaming 'sound-motors' tour their own states and come to the chivalric aid of like-minded colleagues in other states. Men of higher type find such cheap appeals most repugnant; but it is hard for a Senator to hold himself steadily to the cool-headed and conscientious performance of his duties as 'a Senator of the United States' while such roistering campaigning for his seat is in progress in his own state. The 'cost' comes not alone in the temptation to degrade his own campaigning methods, but also and more injuriously in the lowering of his respect for himself and for the dignity and honor of the office which he holds.

Statesmen of an earlier generation were spared such exhausting and repugnant campaigning. In 1903, Senator Hoar had served in the Senate longer than any other man who had there represented Massachusetts. In his last three elections he had had nearly every Republican vote in the legislature, and had been assured that many Demo-

Jep, 2 Jims, 2 Jimmies, Josh, Pat, Ram, Sam, Sid, Ted, and three Will Rogers! But on the run-off ballots of July 28, where the voter's choice was confined to one from the leading two aspirants from his party, there survived from all these twenty-nine nick-named office-seekers only one each of these: Bert, Josh, Sam, and Will Rogers.

cratic votes would have been available, if needed for his election. He attributed this record, not to any special merit of his own, but to the fact that it 'has been the custom of Massachusetts to continue her Senators in public life as long as they were willing and were in general accord with the political opinion of a majority of the people.'<sup>1</sup> Under the present system, what Senator from any one of the larger states can devote his best energies to his senatorial tasks in confidence that faithful and intelligent service 'in general accord with the political opinions of a majority of the people' will win any assurance of renomination in a contest with some clamorous promiser of impossible benefits? A return to election of Senators by state legislatures is neither possible nor desirable. But the newer methods of 'people's choice' are as yet involving serious 'costs' that no thoughtful citizen can afford to ignore.

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#### ABSOLUTE INDEPENDENCE IN THE SENATE

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This is a Senate of equals, of men of individual honor and personal character, and of absolute independence. We know no masters; we acknowledge no dictators.

Such was Webster's characterization of the Senate of his day, in one of his most historic speeches in the Senate Chamber — his 'Reply to Hayne' (January 27, 1830). Almost exactly a century later, after a dozen years of service in the Senate, its President *pro tempore*, Senator George H. Moses, cynically commented thus:

Concerning masters and dictators, I am sure that recent legislation proves that they exist all too plentifully. I do not mean by this that Senators may be said to seek instructions from an individual boss. Far from it, because the individual boss is well-nigh extinct.... But 'when half-gods go, the gods arrive'; and the great god Demos now rules us all. All too frequently we misinterpret his voice, but we all listen to it and hope that we hear it aright.

In 1787, men of most influence in framing the Constitution anticipated that 'the Senate, as a limited number of citizens, respectable

<sup>1</sup> *Autobiography*, II, 4. It has been well said that, in surveying the long list of aspirants for nomination to Senate or to House, the voter's 'superlative question might be made: "Has he the best judgment we can command?"' How many of those clamoring for nomination in the direct primary are eager to have that test applied?

for wisdom and virtue, will be watched by, and will watch over, the representatives of the people; it will seasonably interpose between impetuous counsels.' They looked to the Senate to 'keep down the turbulency of democracy.' It is true that the Senate has jealously retained a more deliberate procedure than the House: it insists upon its right to debate and to amend — rights that the House for the most part has relinquished. But in the quality of the measures that it initiates, in the tone of its debates, and in the modifications that it imposes upon House bills, it is now a question whether the Senate is not taking the lead in 'impetuous counsels' if not in 'turbulent democracy.'

Men who for years have been close observers of Congress agree that the majority of present-day Senators are men of 'moral seriousness' — to use Senator Walsh's phrase — and that in matters of personal conduct senatorial standards are on a higher plane than a generation ago. Scores of Senators, ambitious to render effective service, live laborious days, engrossed in tasks that of late years have become enormously more complicated, and that must be performed amid incessant distractions and under pressures from highly organized minority groups such as were practically unknown before the turn of the century.

By the direct primary and popular election of Senators it was sought to make our choice of Senators more democratic. In some respects substantial progress has been made toward that goal. But if our newer processes both of nomination and election and also of law-making have become more democratic, there is abundant evidence that they have made the winning of a seat in the Senate easier for the demagogue, and have subjected its members to more demagogic demands from within and from without. While the Seventeenth Amendment was under debate, its opponents predicted that its adoption would make the Senate a mere duplicate of the House. After twenty-five years of experience with the results of popular election the question is raised, whether what was formerly the sober and dignified branch of Congress is not 'becoming the more flighty and irresponsible' — whether today it is not the Senate that 'takes more kindly to rash and hasty legislation than does the House.'<sup>1</sup>

<sup>1</sup> Editorial, 'A Political Mystery,' *New York Times*, Feb. 26, 1935. It continues: 'In the Senate party ranks are more easily broken, separate groups strive to set up little circles of control, individual Senators cater more readily to demands upon the Treasury which appear to have large voting strength behind them. It is a process which Senator Gore recently described as trying to buy votes with the money of the people.'

In matters of legislation no other President ever tried to exercise such dominance over Congress as has Franklin D. Roosevelt. In time of war or of keen economic distress leadership inevitably passes from Congress to the Executive. Lincoln and Wilson had their controversies with Congress, especially with the Senate. But neither of them pressed upon Congress such a mass and variety of iconoclastic legislative projects as were comprised in the 'must' measures of the New Deal. In the House, with its three-to-one Democratic majority, its strict party discipline and drastic rules curbing debate and shutting out amendment, prompt approval of the Administration's program without substantial change could be easily gaveted through. But in the Senate it was to be expected that 'must' measures would meet more delay and closer criticism, wise or otherwise — that the traditional sober second thought would 'seasonably interpose between impetuous counsels' sent to it by the President or by the House. It is of interest to note the form and the spirit of the modifications of emergency legislation actually effected or attempted by the Senate under the new stresses to which it was subjected.

#### THE SENATE 'AMENDS' THE FARM-RELIEF BILL (1933)

March 16, 1933, one week after the convening of Congress in special session, the President submitted the Administration's emergency farm-relief program. He described the bill as "a new and untried path," adding that 'an unprecedented condition calls for the trial of new means to rescue agriculture,' and that 'if a fair administrative trial of it is made and it does not produce the hoped-for results, I shall be the first to acknowledge it and advise you.'

The bill as thus transmitted passed the House under a drastic rule that called for but five and a half hours of debate, equally divided between proponents and opponents, to be followed immediately by the previous question on the whole bill. The adoption of this rule, as the Chairman of the Committee on Rules explicitly stated to the House in advance, meant: 'You have opportunity of doing only one thing, either to vote for the bill from cover to cover or to vote against it.' The leader who closed the debate declared: 'We expect the bill to be amended in the Senate.' The vote stood, 315 to 98.

#### *Cost of Production and Price-Fixing*

The Senate's first amendment to this bill provided that the Secretary of Agriculture have authority to estimate 'as nearly as practi-

cable' the cost of producing the 'basic agricultural commodities' specified in the bill and to fix and protect that price for the percentage of the commodity used in domestic consumption. Though full of loopholes and almost certain to be declared unconstitutional, this amendment was approved by a narrow vote in the Senate. But it was opposed by the Secretary of Agriculture, and the House rejected it by a vote of nearly three to one. The Senate receded from its own amendment that had proved too 'rash and hasty' to be accepted by either the Administration or by the House.

#### *The Thomas 'Amendment' — Inflation*

The Administration's inflation program was presented April 20, by Thomas (Oklahoma), as an amendment to this Farm-Relief Bill. McNary, the minority leader, insisted that it ought to be submitted to the Committee on Banking and Currency — that it was 'not fair to the Senate' to bring in as an amendment to a farm bill a currency measure 'involving subject-matter more important than any legislation that has been before the Senate in the last decade.... The proposal should be referred to the Committee on Banking and Currency for investigation, be brought into the Senate as a separate measure, and stand on its own legs.' Referred to that committee, it was reported back the next day with the recommendation that it should be submitted to the Senate as a separate measure and subjected to investigation by the Committee on Banking and Currency. But the majority leader spoke of the need of haste, as the President desired to have assurance of the scope of his monetary powers before entering upon negotiations with foreign governments as to currency stabilization. So without further investigation the Senate entered upon the consideration of the proposed Thomas 'amendment.'<sup>1</sup> In the words of Professor Neil Carothers:

There is nothing like this inflation act in all history. It provides for inflation by every known method of monetary manipulation — by bank-

<sup>1</sup> Specifically, the Thomas amendment gave the President broad discretion, whenever he might find such action necessary to protect the value of the currency, or to expand credit, to use any of the following alternatives:

1. Federal Reserve open market operation in government securities, up to a \$3,000,-000,000 maximum.
2. Issuance of up to \$3,000,000,000 of United States notes, to be used to repay maturing federal obligations or for purchasing outstanding bonds and to circulate as legal tender.
3. To regulate the weight of the gold dollar and the ratio of gold to silver, and to provide for the unlimited coinage of gold and silver.
4. To accept silver in payment of war debts up to a maximum of \$200,000,000, to be used as the basis of additional silver certificates.

note issue, by irredeemable paper, by debasement of the established gold coin, by bimetallism, by arbitrary increase of silver coinage.

This 'amendment's' scope and intent were promptly set forth by its author in opening the debate. Though Thomas had insisted that no precedent required that his 'amendment' to the Farm-Relief Bill be referred to any committee, he now prefaced his remarks by declaring:

No issue in 6000 years save the World War begins to compare with the possibilities embraced in the powers conferred by this amendment. . . .

\$200,000,000,000 now of wealth or buying power rests in the hands of those who own the bank deposits and fixed investments, bonds and mortgages. . . .

If the amendment carries and the powers are exercised in a reasonable degree, it must transfer that \$200,000,000,000 in the hands of persons who now have it, who did not earn it, who do not deserve it, who must not retain it, back to the other side, the debtor class of the Republic, the people who owe the mass debts of the Nation. . . . If that is done, it will not then have done fair and equal justice to the people of the United States.

In the Senate this terrific delegation of power was passed by a vote of more than three to one, and the House concurred by a yet heavier vote. In resorting to these powers the President used great restraint. But the fact that Congress, with such precipitancy, had turned over to one man practically omnipotent control of the nation's money policy and administration encouraged every favor-seeking group to press its claims for hundreds of millions of 'easy dollars,' since their deluge was being stayed only by the hand of the President, as by 'the boy at the dyke'!

#### DOING SOMETHING FOR SILVER

In one special field of inflationary legislation the Senate took the initiative, the President apparently making reluctant concessions to importunate pressure. For many years silver had been a Senate fetish. Among the country's industries the silver industry is a veritable pygmy. In 1929, its banner year, the total value of the United States' domestic silver product amounted to about \$22,000,000 — 'less than the value of our peanuts, or linoleum, or chewing gum.' Silver has no normal price, for 81.5 per cent of our domestic output is a by-product of copper, lead, and zinc refining, its supply therefore being mainly incidental to the demand for those base metals. The silver industry is localized: seven mountain states (Idaho, 31 per cent; Utah, 22 per cent; Montana, 16 per cent; Colorado, 10 per

cent; Arizona, 6 per cent; Nevada, 4 per cent; and New Mexico, 3 per cent) produce 90 per cent of our total output of this industry which contributes only six-tenths of one per cent of our national income. These same seven states, with an aggregate population far less than that of Chicago, also produce fourteen Senators. From that fact arises the 'Silver Problem.' The bargaining power of so large a bloc — fifteen per cent in the Senate, as compared with three per cent in the House — is tremendous. Irrespective of party lines, almost without a break the Senators and Representatives from these states present a united front in the incessant demand that 'something be done for silver.'

Under this bloc's pressure the Senate passed a Wheeler resolution urging our delegates to the London Economic Conference to 'work unceasingly for an international agreement' to remonetize silver on a sixteen-to-one basis. After the break-up of that futile conference, Pittman negotiated some agreements between the United States and other silver-producing and -using countries, by virtue of which the United States was pledged to buy annually for four years at least 24.4 million ounces of silver from its own mines — almost exactly the amount of our total 1932 production. And the purchase price set by the President was nearly fifty per cent higher than the market price anywhere in the world at the time of this price-fixing.

When the Gold-Reserve Bill was before the Senate, Wheeler introduced a silver-purchase amendment that would have required monthly purchases of silver till 750,000,000 ounces had been acquired. This came within two votes of being adopted by the Senate. After the Gold-Reserve Bill had become a law, the Secretary of the Treasury came before the Senate Committee on Banking and Currency and asked that the Administration be given at least a year to experiment with present policies before the enactment of new monetary legislation. But already the White House was being beset by delegations of silver inflationists in Congress, threatening inflation by more radical means if their demands were not granted. May 22, 1934, their importunities won their object. By special message, the President submitted a Silver-Purchase Bill which was approved by the House after only four hours of debate. In the Senate it was approved by a vote of more than two to one, after the rejection of yet more inflationary amendments by Thomas and Long. The bill declared it the policy of the United States that the proportion of silver to gold in the monetary stocks be increased, with the ultimate objec-

tive of having and maintaining one-fourth of the monetary value of such stocks in silver. It also 'nationalized' silver. It was estimated, during the debate, that the issuance of silver certificates in purchase of the silver requisite for the establishment of the 25-75 ratio might cause inflation ranging up to \$1,500,000,000.

During the Seventy-Third and Seventy-Fourth Congresses, silver inflationists again and again used their power to prevent the Senate's legislating on any other money matter unless it would 'do something for silver.' Its concessions, extorted from the Administration, are glaringly inconsistent with any logical 'planned production.' Under present agreements the United States Government will continue for some time to buy newly mined domestic silver practically equal in amount to the total 1932 output, at a price much higher than anywhere else in the world, thus stimulating production at the very time when our legislation has driven China and Mexico to abandon the silver standard, thereby greatly lessening the future monetary demand for silver. Our colossal silver hoard, still being increased by forced government purchases, seems likely to stand 'for eternity' as a monument to legislative folly in the Administration's granting of favors to a small group of 'Silver Senators' for their political support.<sup>1</sup>

#### THE 'BONUS' BILLS

The pressure for veterans' benefits has had a much wider backing. At one of the first conventions of the American Legion, an impatient officer of the order strode down the aisle shouting: 'We've got the votes to *demand* what we want!' Year by year that demand has become more importunate.

In the last year of the Hoover Administration, the issue was joined over attempts to secure immediate payment in full of the Veterans' Adjusted Compensation (popularly called the 'Bonus'). In accordance with the Act of 1924, the certificates would mature and be payable at their face value in 1945. In 1932, when there was pending a Patman bill calling for the immediate payment of the 1945 maturity value of the bonus in greenbacks to the amount of \$2,400,000,000 some twenty thousand veterans came to Washington to press their demands. President Hoover declared that he would veto such a bill. Nevertheless, the House passed the bill by a substantial vote (209 to 176). When it came to the final debate in the Senate, the gallery was thronged by hundreds of veterans, while thousands of others milled

<sup>1</sup> Ray B. Westerfield, *Our Silver Débâcle* (1936), 195 and *passim*.

about the Capitol grounds, their cheers and 'boos' plainly heard within the Chamber. But the Senate rejected the bill by a vote of 62 to 18.

From that day 'immediate payment of the bonus' by one method or another was incessantly urged upon Congress by the most powerful of lobbies. To the Gold-Reserve Bill Robinson (Indiana) offered an amendment to pay the bonus out of the 'profit' which was supposed to accrue from the devaluation of the dollar, but the Senate rejected this proposal without a roll-call. A month later, the Senate rejected by a vote of 24 to 64 a measure brought forward by Huey Long as an amendment to the Independent Offices Bill, calling for immediate payment of the bonus in greenbacks. Meantime in the House a Patman bill, calling for immediate payment of the bonus by greenbacks issued for that purpose to the amount of about \$2,400,000,000, which for many weeks had been held up by the Ways and Means Committee, was finally brought to a vote and passed, 295 to 125. This bill was reported unfavorably by the Senate Committee on Finance. When offered later by the Farmer-Labor Senator as an amendment to the Silver Bill, it was defeated, 31 to 51. Thus, the Senate a second time, but by a lessened vote, rejected a greenback-payment bonus bill, which a second President had declared he would veto.

By the opening of the Seventy-Fourth Congress, 'immediate payment of the bonus' had won many new 'friends at court.' Ex-service men now numbered more than one in four in the House, and exactly one in six in the Senate. In the first session the House again passed a typical Patman bill by an increased vote, 318 to 90. In the Senate it became clear that a bonus-payment bill of some kind would pass. It seemed probable that a narrow majority would vote for a bill providing for immediate bonus payment by proceeds of a bond issue. If the Senate should pass such a bill, and the House concur, and the President should veto that measure, would not his veto be overridden by the Senate as well as by the House? Faced by that dilemma, many of the Administration's chief supporters shifted, and voted for the more obnoxious Patman bill, confident that a veto upon a bill calling for the issuance of more than \$2,000,000,000 in greenbacks could be upheld. The Senate's vote stood 55 to 33 for the passage of the bill. In the days preceding the Senate's vote, a flood of pro-Patman telegrams — seventy-five thousand, it was alleged — from disciples of Charles E. Coughlin, the radio priest, poured upon Senators' desks. Now the pressure was increased, upon the President to sign the bill, and upon

Senators and Representatives to override the veto if it should be imposed. It was reported that five thousand such telegrams were delivered at the White House in a single day, and the radio priest, who credited himself with having defeated the World Court Protocol, took this occasion, speaking ‘in the name of the greatest lobby the people ever established,’ to broadcast an appeal to the President to sign the Patman bill. The President rose to the challenge. To a joint meeting of the House and Senate, to the thronged galleries and by radio to millions of hearers throughout the country, in an address of great courage, vigor, and clarity, he set forth the reasons which compelled him to veto that bill.<sup>1</sup> Hardly had the President left the platform and the Senate returned to its Chamber when, without a word of debate, to the question, ‘Shall this bill pass, the objections of the President notwithstanding?’ the House voted 322 to 98 in the affirmative. The President’s appeal had resulted in a net gain of four votes in 420!

In the Senate consideration of the vetoed bill was postponed till the following day. First to secure the floor was Thomas (Oklahoma), who called attention to the fact that three years theretofore the Senate had defeated a Patman bill similar to the present measure; that since that date in two elections sixty-four Senators had been chosen, and that twenty-three of the Senators who had voted against the Patman bill in 1932 — including all who had been especially conspicuous in bringing about its defeat — ‘are not here today. Where are these twenty-three casualties? They have joined the long list of the politically unknown and forgotten.’ Huey Long harangued the Senate against sustaining the veto, and obtained unanimous consent to have printed in the *Congressional Record* a recent broadcast in which his closing admonition to the nation’s voters was: ‘Wire to your Senators now! . . . Ask them to put their shoulders to the wheel to help override the veto of the President! . . . Wire your Senators! Wire your Senators!’ A new phase, this, of Senators as ‘men of absolute independence!’ By radio and by the *Congressional Record* a Senator of the United States adjures voters throughout the country by telegraph to put pressure on their Senators to unite in overriding the President’s veto, exercised by him under his solemn responsibility to the whole American people!

After brief debate the Senate’s vote stood 54 to 40 in favor of overriding the veto — but it lacked nine of the required two-thirds majority. The earnest plea of the President had won but one single vote

<sup>1</sup> *Cong. Rec.*, 7980–82, May 22, 1935.

from those who had voted for the bill on its passage, and that was the vote of a Senator under heavy obligations to the Administration for support in his campaign for election to the Senate.

In the 1936 session the approaching campaign for the election of President, four hundred and thirty-five Representatives and thirty-two Senators inevitably entered into consideration in the debate and vote on every 'political' question. No one could doubt that in that 'atmosphere' a 'bonus' bill would be passed. At the end of a single week the House by a vote of 356 to 59 sent to the Senate a bonus-inflation bill, calling for the immediate payment of the 1945 maturity value of the adjusted service certificates in cash; or, as an alternative, permitting veterans to hold their certificates, the Government paying interest on them at the rate of three per cent. The bill made no provision for financing the bonus. Ten days later by a vote of 74 to 16 the Senate passed a substitute measure, the principal feature of which was its provision for payment, June 15, 1936, of the 1945 maturity 'bonus' in fifty-dollar three per cent bonds, cashable on demand; or the bonds might be retained at interest till 1945. This provision would lessen the immediate demand upon the Treasury for money and hence the menace of 'printing-press' inflation; but the accumulating interest upon such bonds as should be held till 1945 would in effect mean the payment of 'another bonus' which might aggregate a billion dollars. Senate inflationists were ready with proposals to pay the bonus by the issuance of silver certificates, treasury notes, and bonds (Thomas amendment, voted down, 27 to 64) or by greenbacks (Neely amendment, voted down, 23 to 65). Without a roll-call it rejected King's amendment, which would have been approved by the President — to limit the payment to the cash-surrender value of the adjusted service certificates, instead of their 1945 face value. This would have discharged the Government's obligation under the law of 1924, with a saving to the Treasury of \$1,300,000,000.

The Senate substitute was at once accepted by the House. The following day the President transmitted the tersest of veto messages. He reminded Congress that, only eight months before, in person before a joint session he had given 'complete and explicit reasons' for his returning the bonus bill without his signature, and added: 'I respectfully call your attention to every word I then said. My convictions are as impelling today as they were then. Therefore I cannot change them.' Here was no suggestion of reproof or penalty in case his recommendations were not followed. Without a word of discussion the

House immediately passed the bill over his veto — only two more votes being cast against the bill than on its passage before the veto. The Senate did show the President the slight courtesy of having his earlier veto read before proceeding to override the present one by a vote of 76 to 19. In that vote — a very rare occurrence — every member of the Senate took part. Only twelve Democrats and seven Republicans stood by the President. Twenty-one Senators who the previous May had sustained the President in his disapproval of the Patman currency-expansion payment bill now voted to override the bond-payment veto; among them were the majority leader, the party whip, and the Chairman of the Committee on Finance, all of whom were to come up for election the following November. All of the thirty-two Senators whose terms would expire in 1937 were assumed to be seeking renomination. Of this group only one Democrat (Glass) and three Republicans voted to sustain the veto.

Rarely, if ever, has party leadership in the Senate so completely disappeared in face of the demands of a pressure group threatening reprisals at the polls. The ex-service men — 'veterans' is a misnomer — had won their first big objective, and the field was cleared for the campaign for the service pension.

#### FARM MORTGAGE RELIEF

While the Constitution was in the making, Madison declared his belief that the Senate would guard the minority, who are placed above indigence, against the agrarian attempts of the ever-increasing class who labor under all the hardships of life, and secretly sigh for a more equal distribution of its blessings. Madison could not foresee that the Constitution's guarantee of 'equal suffrage' to states in the Senate within a few generations would result in giving to sparsely settled agricultural states such disproportionate representation that envious 'agrarian attempts' would find soil more congenial for growth there than in the House. Many of the most influential national leaders in the Granger and Populist movements were members of the Senate. Since the World War various farm-relief programs have had in the Senate their chief initiators and most insistent champions.

In the Seventy-Third Congress the novel crop-control bills, starting with wheat and cotton — the products whose surpluses for years had presented a baffling problem — spread till they were applied to a dozen and more 'basic agricultural commodities' with production quotas, processing taxes, and penalties all along the line — legislation

soon to be annulled by the Supreme Court. At first some Senators, Democrats as well as Republicans, had challenged the constitutionality of these measures, but in notable instances their doubts and scruples disappeared when their own states' distinctive products could be brought within the 'basic' group.

Not satisfied with the varied and liberal measures submitted to Congress by the Administration leaders for lightening the burden of farm mortgages, without debate or a record vote the Senate passed the Frazier bill, planned to give to defaulting farm debtors a moratorium of five years during which they might retain possession and management of their farms at a small 'rental,' with the opportunity at the end of that term to regain clear title to their lands at a greatly reduced appraisal. June 16, 1934, by the very thin vote of 133 to 18 this Frazier-Lemke bill passed the House, but with amendments which sent it to conference. It was generally supposed that the bill was dead, but by a filibuster Huey Long kept it alive over the week-end, and in the closing hours of the session it was passed, and the President signed it, declaring in so doing that at the next session it would need much amendment. May 27, 1935, in a unanimous opinion read by Mr. Justice Brandeis, the Court's most revered Liberal, the Supreme Court held the act void:

For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking the property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain, so that, through taxation, the burden of relief afforded in the public interest may be borne by the public. (*Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555.)

In less than three months from the rendering of this decision a new Frazier-Lemke Act was on the statute book. This bill had been carefully revised by the Senate Committee on the Judiciary in an attempt to remove the features which had led the Supreme Court to void the former Act. It substituted a three-year moratorium for the five-year term for farmers unable to meet their debts, and sought to place the whole debt-adjustment process under the jurisdiction of the federal courts in order to secure uniformity in administration and just compensation in accord with the principles of bankruptcy law. In both the Senate and the House it passed without a roll-call, and its constitutionality was promptly affirmed by the Supreme

Court. But why had not the Senate recognized and removed the elemental injustice in the original bill?

In the same session of the Seventy-Fourth Congress there was introduced another Frazier-Lemke bill of very different character and tone. By its provisions farm indebtedness was to be refinanced at an interest rate of one and one-half per cent, an amortization charge of one and one-half per cent also being payable annually for a period of about forty-eight years. Requisite funds were to be obtained by the Government by the sale of low-interest bonds, or, if that should prove impossible, by the delivery of the bonds to the Federal Reserve System as security for a special issue of Federal Reserve notes under this Act, limited to \$3,000,000,000. Opponents of the measure insisted that there was here no real option, for, in their belief, the proposed bonds could not be sold to the public, and the dumping them upon the Federal Reserve Banks would wreck that system through bald greenback inflation. This bill was pigeonholed by the House Rules Committee for more than a year. Not till late in the second session was the committee, on petition vote, discharged from its further consideration. Two days later, by a vote of 142 to 235 the House defeated the bill. On the closing night of the session, Frazier offered the bill as a rider on the Guffey Coal Bill, simply to put Senators on record. It was rejected, 17 to 34. Significantly, hardly more than half the members of the Senate chose to be recorded in this vote.

The Administration considered that this bill involved the most serious threat of greenback inflation it had met, and its leaders had taken strenuous measures to ensure its defeat. On the other hand, its supporters, bitterly resenting the majority leaders' long delay in letting the bill be brought before the House, kept threatening reprisals at the polls, pledging themselves to 'campaign against every member who voted "Nay,"' and claiming that President Roosevelt's defeat was certain if the bill should fail to pass. Coughlin, the radio priest, passionately championed the bill, and announced that Lemke, its co-author, was to be the candidate for President who should have the support of his National Union Party, and urged that every candidate for Senate or for House be challenged to pledge his support to this Frazier-Lemke bill.

At the Cleveland convention of the Union Party, where delegates of Coughlin's politicalized National Union for Social Justice conferred with representatives of Huey Long's 'Share-the-Wealth'

movement and devotees of the Townsend Revolving Pension Fund Plan, the man chosen by Coughlin to make the keynote speech was a newly elected Senator of the United States. During the summer all three of these insurgent organizations actively entered the campaign, endorsing Democratic or Republican candidates for Senate or House, from whom they had extorted pledges, or putting into the field candidates of their own. Lemke kept predicting that his Union Party would win enough electoral votes to throw the election into the House, where 'at least a hundred members' elected by the Union Party would hold the balance of power and elect him President.

Not easy, in this day and generation, is the path of 'Senators of absolute independence, who know no masters, and who acknowledge no dictators.'

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In the Senate Chamber, March 2, 1805, Vice-President Aaron Burr bade a formal farewell to the Senate over which he had presided for four years. Probably no other address ever cast such a spell upon the Senate. One of its members wrote that the whole Senate was in tears and so unmanned that it was half an hour after his departure before they could recover themselves sufficiently to come to order, choose a President *pro tempore*, and then adjourn!

In closing that address which had so hypnotized his hearers, the Vice-President spoke as follows:

This House is a sanctuary; a citadel of law, of order, and of liberty; and it is here, in this exalted refuge, here, if anywhere, will resistance be made to the storms of political phrensy and the silent arts of corruption; and, if the Constitution be destined ever to perish by the sacrilegious hands of the demagogue or the usurper, which God avert, its expiring agonies will be witnessed on this floor.

In writing of this scene to his father, Senator John Quincy Adams wrote that the speaker's 'allusion to the circumstances which had just taken place was obvious, . . . and it seemed to me that there was not a member present but felt the force of this solemn appeal to his sense of duty.'

That 'solemn appeal' had been addressed to the Senate on the very day after its members, with high courage and independence, had made one of the most critical decisions in the history of the nation. Through three months Samuel Chase, an Associate Justice of the Supreme Court, had been on trial upon impeachment charges brought by a House subservient to President Jefferson before a

Senate in which men of Jefferson's party also held a large majority. Excitement had been tense, for it was believed that, if the Administration succeeded in ousting Chase by impeachment, charges would at once be launched against Chief Justice Marshall. But not all the pressure which Jefferson could bring to bear, nor the passionate appeals of Nicholson and Randolph, the counsel for the House managers, could secure from the Senate the two-thirds majority necessary to sustain a single one of the articles of impeachment. The Senate had evinced the courage and the impartiality that befitted the nation's High Court of Impeachment. As 'a citadel of law, of order, and of liberty,' it had withstood the President's assault upon the independence of the Supreme Court.

In 1937, President Roosevelt faced a situation in many respects analogous to that which President Jefferson had encountered in 1805. Each of them had first become President at the end of a period of twelve years during which all appointments to the Supreme Court had been made by Federalists or Republicans. Not only had each of them been triumphantly re-elected, but he now could deal with a Congress in which both the Senate and the House were controlled by heavy majorities of his own party. In his first term each President had come to resent the restraints that the Supreme Court had exercised upon the sweeping changes in government he was eager to bring about. Both Jefferson and Roosevelt believed that the Supreme Court should be so reorganized that it would 'co-operate' with the President — in other words, so that it could be depended upon to validate whatever legislation he could persuade Congress to pass. Heartened by the 'mandate' which he read in his re-election, each President with confidence set out to secure from a complaisant Congress the desired reorganization. In each instance the determination of his success or failure in this enterprise was to devolve upon the Senate.

Jefferson sought by impeachment to remove Justices whose views were opposed to his own. But in the Senate, Democrats joined with Federalists in refusing to 'compel the Court to express the will of the Executive.'

Roosevelt chose a different method. Disregarding the spirit and the letter of the Democratic platform upon which he had been elected, he took obvious delight in springing his Court Reorganization Bill upon Congress without any previous discussion of its provisions

either with congressional leaders or with his Cabinet. The heart of the bill, as it seemed to Senators and to the public, was its proposal to grant to the President, by a mere majority vote in Congress, discretionary power to name additional Justices up to the number of six — a maximum large enough to assure during the current session of Congress the validation of all the New Deal laws under challenge before the Supreme Court, and of other measures, as yet undisclosed, which the President might persuade Congress to enact. To the President's surprise, the first reaction to his bill, in Congress and from the public, was amazement; and the second, a rapidly growing opposition. Forthwith it became known that the House Judiciary Committee would not report the bill favorably. Rather than arouse bitter feeling by trying to 'dragoon' the bill through the House against the judgment of its leaders, the Administration's strategists decided to shift the scene of battle to the Senate. But in the Senate determined opposition at once developed. A decided majority of Democrats on its Judiciary Committee denounced the measure as a 'Court-packing bill,' and the committee brought in a scathingly adverse report.

In debate the bill's sponsors devoted more energy to exhorting Senators to support the President than to attempts to demonstrate its merits or to defend it against devastating charges of inconsistency and subterfuge. Their spokesman — former chief justice of a state supreme court! — made his main appeal to Senators to remember that many of them would not be enjoying their present seats had it not been for the help they had received from the President in their election campaigns!

The opposition was well organized. Republicans took no part in the fight to defeat the bill. It was Democrats, who had been strong supporters of most of the President's New Deal measures, who now took the lead in denouncing 'this attempt to change the constitutional balance of the Government by usurpation,' this 'completely arbitrary use of power to drive a reluctant Congress to violate its pledges and to degrade its conscience.' In ending one of the most effective speeches of the entire debate, a heretofore steadfast supporter of the New Deal policies declared:

The Jeffersonian Senate of 1805 believed in the independence of the judiciary; the Jeffersonian Senate of 1805 believed, in the face of great provocation, that the correct way to correct abuses in the judiciary is not to pull the judiciary down, but to build it up. So they acquitted

Justice Chase; and, Mr. President, I make the prediction that this bill will never pass by the votes of Democrats.

Every form of pressure was employed by the Administration to break down the opposition, but in vain. In a Senate more than three-fourths of whose members were Democrats, by a vote of 70 to 20 the compromise bill was sent back to the Judiciary Committee for further consideration and report at the beginning of the next session of Congress.

Thus, after one hundred and thirty-two years, the Senate a second time approved itself 'a citadel of law, of order, and of liberty,' in notwithstanding a President's assault upon the independence of the judiciary.

But the Senators were soon to face a more searching test. The retirement of Associate Justice Van Devanter gave to President Roosevelt his first and long-desired opportunity to name his standard of 'Liberal' for a seat upon the Supreme Bench. The actual selection was purely personal. Taking counsel with no one but the nominee, with boyish delight in the perturbation that his 'surprise' nomination would cause, he sent to the Senate the name of Hugo L. Black, Senator from Alabama. For this choice the most obvious grounds were two. In the first place, from Black's record in the Senate, both as to the measures he had supported and as to his activities — extremely vigorous, if at times unjudicial to the verge of illegality — as 'prosecutor'-chairman of some Senate investigation committees, it was certain that upon the Supreme Court he would 'co-operate with the President' in determined advocacy of most of the measures upon whose validation the President's heart was set. In the second place, in reprisal for the check by which the Senate had recently affronted him by balking his plan for 'Supreme Court reform,' the President could now find satisfaction in submitting a nomination whose confirmation, he felt sure, the Senate could not reject nor even delay. It was a clever and successful play.

For the tradition of 'senatorial courtesy' ordinarily secures immediate confirmation for the nomination of a Senator, with no delay for its consideration by the Senate or by a committee. In this instance objection forced the nomination's being laid over to the next day and referred to the Judiciary Committee. When it came back with a favorable report, there ensued a brief debate, in which it was urgently insisted that the nomination be recommitted for further consideration of some technical questions as to the nominee's eligi-

bility,<sup>1</sup> and also for investigation of some new charges — to be supported by sworn testimony — that the nominee was or had been a member of the Ku Klux Klan, bound by oath to beliefs and practices incompatible with service as an Associate Justice of the Supreme Court. But the club-member ‘courtesy of the Senate’ could brook neither objection nor delay. It secured immediate confirmation by a vote of almost four to one.

The historian may well ponder the significance, for that day and for the future, of that headlong and heedless confirmation by such a vote, given by the Senate which in exalted mood, after days of thrilling debate, had so recently by a vote of 70 to 20 withstood the President’s attempt to ‘pull the Supreme Court down.’ Senators had then felt that they must risk all in defense of one of the most revered and essential institutions of our American Government, and in defense, hardly less, of the self-respect of the Senate, affronted by the demand that it should join in this degrading of the Supreme Court. But their speeches and votes against the Court Bill had been bitterly resented by the President. Reprisals, specific as to individually named Senators, had been threatened. Of the thirty-two Senators whose terms were to end with that Congress, not a single one put his vote on record against confirmation of the President’s nominee. Yet, only a few days later, specific disclosures — never disproved nor denied — as to the nominee’s membership in the Klan and the practices by which he had secured Klan support, without which, as he himself was alleged gratefully to have acknowledged, his Senate seat could not have been won, brought embarrassment and humiliation to many Senators who declared they could not have voted for Black’s confirmation had these disclosures been brought to light before the vote was taken. But, as every Senator knew, sworn testimony upon these points had been declared to be at once available. Its truth could easily have been determined had not four out of five of the Senators, because of a threadbare tradition of ‘senatorial courtesy’ or because of fear of the loss of Administration backing for their re-election, shirked their plain responsibility and duty to exercise the best judgment of which they were capable as to the fitness of Senator Black for the exalted post for which the President had named him.

The Senate — ‘the citadel of law, of order, and of liberty.’ There is significance in the frequency with which the Senate has been re-

<sup>1</sup> For action taken by President Washington in an analogous case, see p. 180.

fferred to as a 'citadel.' It has been called 'the citadel of common sense' — an enviable encomium to which the Senate has not at all times proved its rightful claim. In his inaugural address before the Senate, Vice-President Coolidge declared: 'The great object for us to seek here is to continue to make this Chamber, as it was intended by the Fathers — the citadel of liberty.' Today the appeal for a strong, independent, responsibility-taking Senate finds its chief justification not in the fact that it was so 'intended by the Fathers.' It is the need of the present that matters.

Years ago<sup>1</sup> Senator Walsh declared: 'The Senate is the last citadel of minority rights and the protector of weaker states. In an age when executive authority is expanding tremendously, the Senate is the only safeguard against executive usurpation and bureaucratic tyranny.... It is the bulwark of our liberties.'

Every phrase in that statement challenges re-examination in view of the political, social, and economic trends revealed by the past decade. 'All progress is change; but not all change is progress.' What is needed today is not a Senate controlled by 'conservatives,' resistant to the adaptation of law and administration to meet twentieth-century conditions, but rather a Senate that claims as of right the exercise of independent judgment, as a branch of the National Legislature, representative of the people and not of the Executive. The unique combination of powers by the Constitution allotted to the Senate should make it the impregnable 'citadel of liberty.'

To those who have felt concern as to the steadfastness, courage, and morale of the garrison of that citadel, Senator Walsh has replied: 'In any event, all who sit here have been sent by the American people. An indictment of the Senate is an indictment of the whole people.'

Burke's warning against bringing an indictment against a whole people should not be forgotten. Senators are not sent to the Capitol 'by the American people.' Individually, they are sent there by forty-eight different sections of the American people. Some of the Senators thus sent are by no means representative of 'the whole people.' The manning of that 'citadel' with strong, progressive, trustworthy men — men of absolute independence, who 'know no masters and acknowledge no dictators' — is a major part of the problem of democracy in America. It is a responsibility that now rests unescapably upon the voters in every state of the Union.

<sup>1</sup> June 24, 1924.

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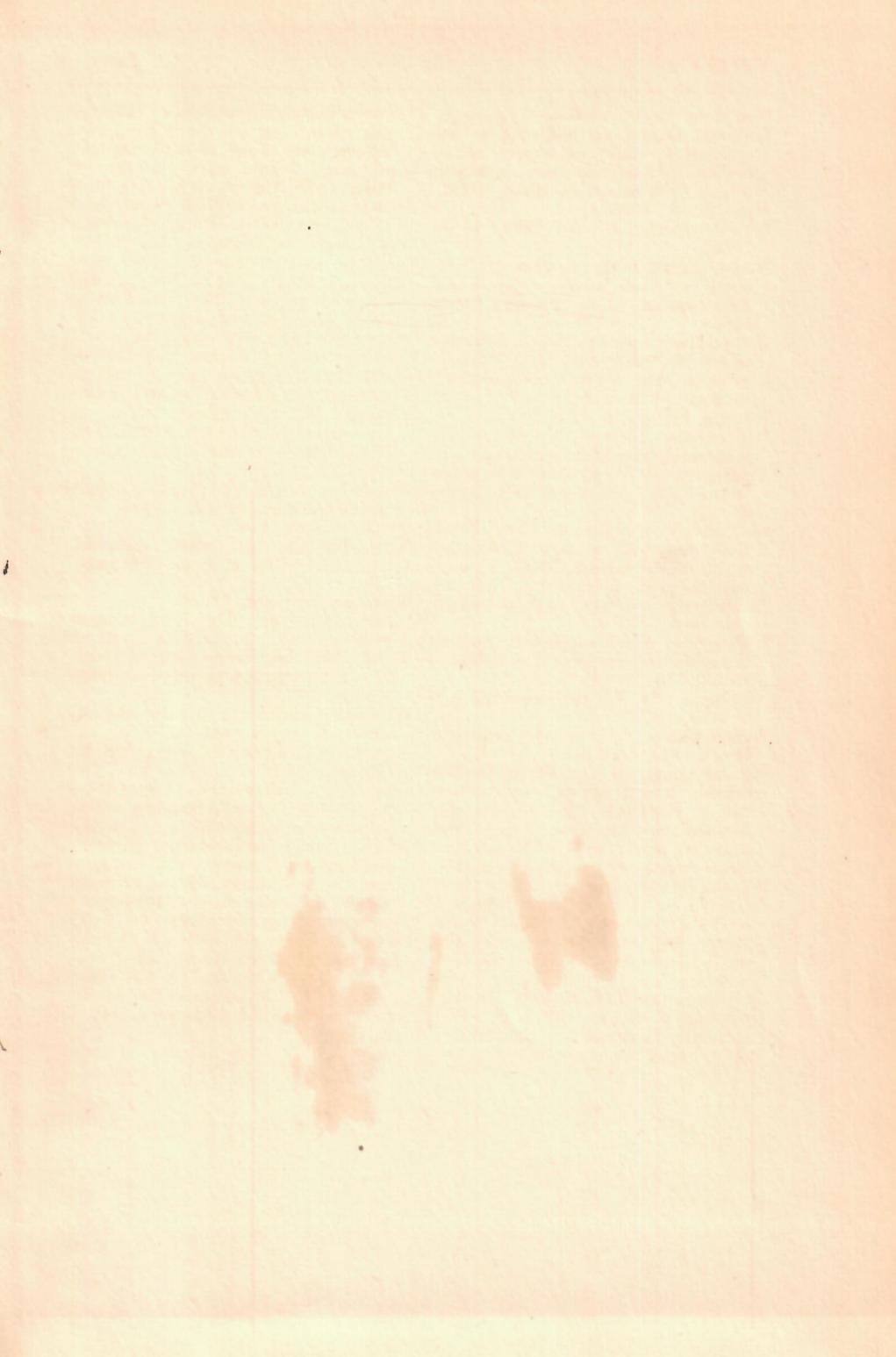
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